Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL F. HAHN and
MARIE HAHN,

Petitioners,

v.

STAR BANK, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a private attorney who possesses the subpoena power of the state and intentionally misuses that subpoena power, going beyond his or her authority, thus causing deprivation of a property interest in the protection of the privacy of a consumer report under the Fair Credit Reporting Act, deprivation of a property interest in an implied contract of confidentiality with a bank and deprivation of due process under the Fourteenth Amendment is acting under color of law for purposes of 42 U.S.C. § 1983?

II. Whether, (excluding a federal grand jury subpoena), an appearance of an order of a court, issued by a private attorney, without a judge's review and signature is valid and due process under the FCRA to obtain a consumer report for litigation, an impermissible purpose?

III. Whether summary judgment should be granted without any discovery, based on the sole evidence of an affidavit of an interested party?

IV. Whether a credit report, issued by a consumer reporting agency, to a user, for a permissible purpose under the FCRA, is a consumer report, but no longer protected under the provisions of the FCRA when it is disseminated from a user to a third party user?

V. Whether a bank, which obtained a consumer report as a user under the FCRA, becomes a consumer reporting agency when it disseminates the consumer report, which includes information based on transactions and experiences that are not its own experience with the customer, to third parties without a valid order of a court under the FCRA?

VI. Whether a bank, acting as a consumer reporting agency, has to disclose all information in its file to a consumer?

PARTIES TO THE PROCEEDING

Petitioners

Michael F. Hahn and Marie Hahn are individuals with no corporate affiliations.

Respondents

Star Bank, Central Ohio, ATIMA, Thomas R. Green, Jerry Grundhofer, David Moffett, Jeff Bonynge, Paul Beery, John Gonzales, Crabbe, Brown, Jones, Potts & Schmidt, William B. Leahy, Thompson Hine & Flory LLP, Domtar Gypsum, 84 Lumber & Home Center, Pierce Hardy Real Estate, Inc., 84 Associates, Inc., and Georgia Pacific Corporation.

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Petitioners, Michael F. Hahn and Marie Hahn, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 190 F.3d 708 (6th Circuit 1999). A copy of the Opinion is included in the Appendix at App. A at 1a-23a*. The Opinions of the District Court for the Southern District of Ohio, No. 97-00677 are unpublished and are included in App. B (24a-35a), App. C (36a-56a), and App. D (57a-67a).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on September 2, 1999. On September 15, 1999, Petitioners filed a Petition for Rehearing and Petition for Rehearing En Banc which the United States Court of Appeals denied on October 20, 1999 (App. E at 68a-69a). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The Fourteenth Amendment to the United States

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* Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

42 U.S.C. § 1983
Civil Action For Deprivation Of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

15 U.S.C. § 1681
Fair Credit Reporting Act

15 U.S.C. § 1681a. Definitions; rules of construction provides in relevant part:

> (d) The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal,

family, or household purposes . . . (A) Any report containing information solely as to transactions or experiences between the consumer and the person making the report . . . (f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

15 U.S.C. § 1681b. Permissible purposes of consumer reports provides in relevant part: A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

15 U.S.C. § 1681g. Disclosures to consumers provides in relevant part:

(a) Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

(1) The nature and substance of all information in its files on the consumer at the time of the request.

15 U.S.C. § 1681n. Civil liability for willful noncompliance provides:

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this title [15 USCS 1681 et seq.] with respect to any consumer is liable to that consumer . . .

15 U.S.C. § 1681o. Civil liability for negligent noncompliance provides:

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this title [15 USCS § 1681 et seq.] with respect to any consumer

15 U.S.C. § 1681p. Jurisdiction of courts; limitation of actions provides:

An action to enforce any liability created under this title [15 USCS § 1681 *et seq.*] may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this title [15 USCS § 1681 *et*

seq.] to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this title [15 USCS §§ 1681 *et seq.*], the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

15 U.S.C. § 1681q. Obtaining information under false pretenses provides:

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses . . .

Civil Rule 45 Subpoena provides in relevant parts:

(A) Form; issuance

(1) Every subpoena shall do all of the following:

(b) command each person to whom it is directed, at a time and place specified in the subpoena, to:

(i) attend and give testimony at a trial, hearing, or deposition;

(ii) produce documents or tangible things at a trial, hearing or deposition;

STATEMENT OF THE CASE

Star Bank approved a mortgage loan for us in September, 1990. In April, 1992 we filed a lawsuit against 84 Lumber under the Ohio Consumer Sales Practices Act. 84 Lumber brought Domtar Gypsum, the manufacturer into the lawsuit as a third party defendant, for indemnification. John Gonzales, employed by the law firm of Crabbe, Brown, Jones, Potts & Schmidt, represented 84 Lumber in the lawsuit. William Leahy, employed by the law firm of Thompson Hine & Flory, LLP, represented Domtar Gypsum in the 84 Lumber lawsuit. Michael Fusco represented us in the lawsuit against 84 Lumber. Star Bank was not a party to the state court lawsuit. We received a jury verdict in our favor against 84 Lumber for violation of the Ohio Consumer Sales Practices Act, the only issue tried and awarded.

After the trial on October 29, 1993, while we were awaiting the jury verdict and our attorney was out of the courtroom, John Gonzales handed us a stack of papers. Mr. Gonzales gave no explanation of how he had obtained the papers. He fraudulently concealed that he had obtained them unlawfully. We filed an appeal for attorney fees and treble damages and the 84 Lumber case wasn't resolved until March, 1995.

On July 3, 1995, Plaintiff Michael Hahn returned a telephone call from Jeff Bonynge, Vice-President of Star Bank in charge of our mortgage loan. Mr. Hahn asked Mr. Bonynge about the file. Mr. Bonynge said that the bank does not give out entire files and he willfully misrepresented to Mr. Hahn that bank counsel looks at subpoenas for what is specifically asked for and removes what is personal and confidential. We knew at this point that we were not being told the truth. We looked for a subpoena to Star Bank in the

court records. We found no subpoena and filed the first lawsuit against Star Bank on October 28, 1996. We dismissed the first lawsuit on February 10, 1997. We filed the second lawsuit on June 13, 1997 and we included additional defendants and additional causes under the FCRA, constitutional right to privacy, civil rights and state causes.

Mr. Bonynge filed an affidavit in August, 1997, verifying that he had given out the entire file (which proves that he had willfully misrepresented in July, 1995, that bank counsel handled the subpoena). Mr. Fusco gave conflicting affidavits as to whether he received a copy of the subpoena which could not be resolved without discovery.

The District Court granted summary judgment to Star Bank on the sole evidence of an affidavit of an interested party, James J. Barresi, an employee of Star Banc Corp. The District Court denied our motion for leave to file an amended complaint. The District Court dismissed the complaint against all of the other Defendants. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court.

REASON FOR GRANTING THE WRIT

The petition should be granted because the Sixth Circuit Court of Appeals in its published decision, decided important questions under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 in a manner that conflicts with relevant decisions of this court. The Sixth Circuit Court of Appeals deviates from Congressional mandate in 15 U.S.C. § 1681.

The Sixth Circuit Court of Appeals's decision is contrary to the letter and spirit of *Logan v. Zimmerman*

Brush, 455 U.S. 422 (1982); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Hudson v. Palmer*, 468 U.S. 517 (1984); *West v. Atkins*, 487 U.S. 42 (1988); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991); *Screws v. United States*, 325 U.S. 91 (1945); *Brock, Secretary of Labor et al. v. Roadway Express, Inc.*, 481 U.S. 252 (1987); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Sonnenthiel v. Christian Moerlein Brewing Co.*, 172 U.S. 401 (1899); *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); and *Haines v. Kerner*, 404 U.S. 519 (1972).

I. A Private Attorney Caused Deprivation Of Property Interests Without Due Process Under The Fourteenth Amendment Because The State Gave Him The Authority To Issue Subpoenas And He Misused That Power.

The property interests of which we were deprived, the protection of the privacy of our consumer report under the FCRA and our property interest in implied and actual contracts of confidentiality with Star Bank, were before the District Court.

We filed the complaint against the defendants for violating our right to protection of the privacy of our consumer report under the FCRA. A copy of our loan file, which we received from Mr. Gonzales, including the TRW credit report, was attached to our Memorandum Contra to Star Bank's Motion To Dismiss and for Summary Jugment. Acting pro se, we attached the TRW credit report to at least two memorandums. Our property interest in our rights under the FCRA was before the court in all of our briefs.

We asserted in our briefs that Mr. Gonzales' subpoena was unlawful and invalid under the FCRA, citing case law and FTC Subchapter F -- Statements of General Policy or Interpretations Under the Fair Credit Reporting Act, 16 C.F.R. § 604(1)(1-1-99 Edition). "A subpoena, including a grand jury subpoena, is not an 'order of a court' unless signed by a judge." The order of a court requirement under the FCRA supersedes the violations of Mr. Gonzales' subpoena under Civil Rule 45 because of our TRW credit report. It is a consumer report as a matter of law.

The Sixth Circuit decided the issue of due process and weighed the evidence, (with no discovery): (1) Mr. Gonzales' affidavit which states that he sent a copy of the subpoena to Michael Fusco; (2) Mr. Fusco's two conflicting affidavits regarding receipt of the subpoena; and (3) the fact that there is no record of the subpoena with the court. Notice to Mr. Fusco of Mr. Gonzales' Rule 45 subpoena was not due process under the FCRA. Under the FCRA, Mr. Gonzales was required to go through the court to move for an order and Mr. Fusco would have been properly notified and required to reply to the motion and the judge would have reviewed the file, (the file was not pertinent to the lawsuit). This was the due process due under the FCRA. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982):

> ". . . What the Fourteenth Amendment does require, however, "is 'an opportunity . . . granted at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case,' *Mullane v. Central Hanover Tr. Co.*, supra, at 313." *Boddie v. Connecticut*, 401 U.S., at 378."

Congress dictated the process that was due, an order of a court, before deprivation of the privacy of a consumer report and redefined its intent in the 1989 Amendment.

In our first cause of action in the complaint we filed for Breach of Contractual Duty of Confidentiality. The Authorization for Disclosure, which we signed for Star Bank was in the copy of the loan file provided to the court and it was attached to two of our briefs.

We cited *Peterson v. Idaho First National Bank*, 367 P.2d 284, 290 (1961): ". . . It is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer's or depositor's account . . ."

See Mertik v. Blalock, 983 F.2d 1353, 1360 (6th Cir. 1993):

> "Under Ohio law, the right to contract is a property right: The right to contract is specifically guaranteed by Section 1, Article 1 of the Ohio Constitution and is within the protection of the Fourteenth Amendment to the United States Constitution. It is a property right. Similarly, an interest in a contract has been held to be a property interest. *Joseph Bros. v. Brown*, 65 Ohio App.2d 43, 415 N.E.2d 987, 990 (1979) (citations omitted)."

Unauthorized by law, Star Bank mailed our entire loan file, including the TRW credit report, to Mr. Gonzales, ex parte. The "Gonzales Defendants" have affirmed this fact. Following Civil Rule 45 and under the implied contract of confidentiality with us, Star Bank had a duty to move to quash

the overbroad subpoena or to object to the production of our private and confidential documents. (The subpoena requested "any and all files, documents, or other papers . . .") The first part of the subpoena requested that Star Bank bring the documents to trial. The second part of the subpoena offered Star Bank an ex parte mail-in option. We outlined to the District Court in our memorandums the violations of Mr. Gonzales' subpoena under Rule 45 which resulted in the ex parte production of our entire loan file. The mail-in option was not due process, before depriving us of the confidentiality of our loan file. (The Defendants have not produced any evidence of notice to Mr. Fusco of a time and place of production of our file other than at trial, the only time and place listed on the subpoena as per Rule 45).

Mr. Gonzales subpoena was void under Ohio law. *See Sharp v. Kimmell*, 30 Abs. 336 (1939): ". . . a subpoena duces tecum purporting to require the person subpoenaed to bring with him books and files under his control, without particularly describing such books and files is wholly void. §§ 11503, 11551; § 14 Art. I, Ohio Constitution."

In light of the fact that we presented all of these facts, case law and arguments to the District Court, concerning our property interests under the Fourteenth Amendment and the violation of the subpoena under the FCRA and Rule 45, the Sixth Circuit's concurring in the District Court's conclusion that: "(1) they failed to allege why the state procedures relating to the issuance of a subpoena are inadequate, and (2) they did not provide any factual support for their allegations that they were deprived of a life, liberty, or property interest by the defendants' actions.", and that we only gave bald assertions regarding a general deprivation of civil rights, is erroneous.

Even if our complaint were deficient we were acting pro se and our supporting papers developed the legal theories. *See Neitzke et al. v. Williams*, 490 U.S. 319, 330 (1989) at footnote 9: ". . . Second, the liberal pleadings standard of *Haines* applies only to a plaintiff's factual allegations. Responsive pleadings thus may be necessary for a pro se plaintiff to clarify his legal theories." *See Boguslavsky v. Kaplan*, 159 F.3d 715, 719 (2nd Cir. 1998): "Thus '[b]ecause [Boguslavsky] is a pro se litigant, we read his supporting papers literally, and will interpret them to raise the strongest argument that they suggest.'" (citations omitted) *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1259 (9th Cir. 1992): "Before dismissing a pro se complaint a court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively."

The Sixth Circuit erroneously applied *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983) to this instant case (which follows *Parratt v. Taylor*, 451 U.S. 527 (1981), stating at page 12: "the plaintiff must plead and prove that state remedies for redressing the wrong are inadequate."

In our briefs to the Sixth Circuit we cited *Mertik v. Blalock*, 983 F.2d 1353, 1365 (6th Cir. 1993): "Because the gravamen of the complaint was that the state procedure itself deprived the licensee of due process, the court did not impose *Parratt's* burden of pleading and proving the inadequacy of state remedies. *Macene*, 951F.2d at 706." *See Hudson v. Palmer*, 468 U.S. 517, 532 (1984):

> "Two terms ago, we reaffirmed our holding in *Parratt* in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), in the course of holding that post deprivation remedies do not satisfy

> due process where a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action." (footnote omitted).

The state established procedure, in this case, the subpoena, was the basis for the deprivation of due process and our property interests under the Fourteenth Amendment. The subpoena was invalid under the FCRA and Civil Rule 45 as we presented to the court. The District Court and the Sixth Circuit declined to resolve the issues of the subpoena; however, the Sixth Circuit ruled that an appearance of an order of a court, issued by an attorney is valid under the FCRA.

The Sixth Circuit reversed the District Court's decision on color of law, applying *Barnard v. Young*, 720 F.2d 1188 (10th Cir. 1983), which did not pertain to misuse of a subpoena; and overruling *Timson v. Weiner*, 395 F. Supp. 1344, (S.D. Ohio 1975), in which the attorney misused the subpoena power of the state to violate First Amendment rights. The Sixth Circuit has granted immunity to attorneys for misuse of the subpoena power of the state to violate constitutional rights. *See West v. Atkins*, 487 U.S. 42, 49 (1988): "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" Quoting *United States v. Classic*, 313 U.S. 299, 326 (1941). *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 626 (1991): " . . . The fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised . . ." *See Screws v. United States*, 325 U.S. 91, 110 (1945): ". . . as he acts in the name and for the State,

and is clothed with the State's power, his act is that of the State . . . 100 U.S. at p. 347." *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3rd Cir. 1994), at 1267: *see Fox Rothschild I*, 787 F. Supp. at 477. "Consistent with *Lugar*, private attorneys, acting on their client's behalf who invoke the machinery of the state to effect an ex parte seizure of property can be found to be state actors under § 1983." *See Brock, Secretary of Labor, et al. v. Roadway Express, Inc.*, 481 U.S. 252, 278 (1987): "Traditions of fairness that have been long honored in American jurisprudence support the strongest possible presumption against ex parte proceedings."

Mr. Gonzales invoked the subpoena power of the state and misused that power to issue an unlawful subpoena, which resulted in an ex parte acquisition of our loan file. He used state power under Rule 45 to serve the subpoena.

Mr. Gonzales fraudulently concealed his unlawful ex parte acquisition of the loan file from the court and us. Mr. Gonzales gave us a stack of papers in the courtroom and with apparent authority said that he had kept what he wanted and we could have the rest. We were appalled that he had obtained them, but we did not suspect him of any illegal activity. Because we did not know that we were injured by any illegal activity, we were not obligated to investigate any claims, because we did not realize that there were any. Mr. Gonzales fraudulently concealed that he had obtained the papers unlawfully, Furthermore, this took place in a courtroom. *See Edmonson, supra*, 500 U.S. at 628: "Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it." The Tenth Circuit in *Wolf v. Preferred Risk Life Insurance, Co.*, 728

F.2d 1304, 1307 (1984) states: "Questions of when a reasonable person would discover an injury and what a reasonable person would have done are generally within the province of the jury." *See Briskin v. Ernst & Ernst*, 589 F.2d 1363, 1369 (9th Cir. 1978) "the conflicting assertions . . . about what a reasonable investor would have known presented issues of the type usually reserved for juries . . ."

II. This Decision of The Sixth Circuit Is In Conflict With Congressional Intent In Ruling That An Appearance Of An Order Of A Court, Issued By A Private Attorney Is The Equivalent Of An Order Of A Court Under The FCRA And That Preparation For Litigation Is A Permissible Purpose Under The FCRA.

In 1989, the words, ". . . or a subpoena issued in connection with proceedings before a Federal grand jury" were added to 15 U.S.C. § 1681(b)(1). *See* Pub. L. 101-73, Title IX, § 964(c), 103 Stat. 506 (1989). This 1989 Congressional amendment made an exception for Federal grand jury subpoenas, not state grand jury subpoenas or attorney issued subpoenas. The only other exceptions to the order of a court requirement under the FCRA are the I.R.S., F.T.C., and the F.B.I.

Prior to the 1989 Amendment, courts were divided on the issue of whether a grand jury subpoena was an order of a court within the meaning of the FCRA. The Ninth Circuit was the first circuit to rule on the issue in *In Re Gren*, 633 F.2d 825 (1980). *See Doe v. Digenova*, 779 F.2d 74, 82 (D.C. Cir. 1985): "The legislative history of the FCRA reveals that Congress consciously decided to use the 'order' language and not 'process.'" *See In Re Gren*, 633 F.2d 825, 826-828 (9th Cir. 1980).

The Sixth Circuit has now ruled that an attorney issued subpoena which has "every appearance of being 'an order of a court,'" is valid under the FCRA, citing *In Re Grand Jury Proceedings*, 503 F. Supp. 9, 12 (D.N.J. 1980) which is a FCRA Federal grand jury subpoena case. The underlying case in this instant case was a civil litigation case filed in state court. The Sixth Circuit has applied *In Re Grand Jury ?roceedings*, 503 F. Supp. 9, a 1980 FCRA case, to this instant case in conflict with the 1989 amendment, to create a new exception to the meaning of "order of a court" under the FCRA, for private attorneys who issue subpoenas which appear to be orders of a court.

Congress passed the 1989 amendment to eliminate the dissension in the courts over the order of a court requirement under the FCRA. This Sixth Circuit decision and interpretation will start the dispute once again causing chaos and division in the courts.

The Sixth Circuit has also accepted Star Bank's argument " . . . that its good faith compliance with a facially valid subpoena was entirely proper. . ." "Facially valid" is not within the meaning of an "order of a court" under the FCRA. By accepting "facially valid" subpoenas under the FCRA the Sixth Circuit has undermined liability for users and consumer reporting agencies.

In order to obtain an order of a court signed by a judge, Mr. Gonzales would have had to file a motion for an order, through the court, not around the court. All parties would have had time and opportunity to be heard in meaningful manner, through the court, in response to the motion. This due process was the first step of the process required to obtain an order of a court, in addition to the due process of judicial review and a judge's signature. *See In Re*

Vaughn, 496 F.Supp. 1080, 1083 (1980): ". . . Indeed, the possibility for such parties to respond to a motion for an order, absent where the government simply issues a subpoena, is another compelling reason for holding that a subpoena is not an order . . ."

Mr. Gonzales' subpoena was issued outside of the preview of the court and no return was filed. By ruling that an appearance of an order of a court is valid, the Sixth Circuit has ruled that Mr. Gonzales' ex parte acquisition of our consumer report for preparation for civil litigation in defense of his client is permissible under the FCRA.

The following courts have also held that litigation is not a permissible purpose under the FCRA: *Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 968 (4th Cir. 1987); *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264 (9th Cir. 1990); *Bakker v. McKinnon*, 152 F.3d 1007 (8th Cir. 1998); *Duncan v. Handmaker*, 149 F.3d 424 (6th Cir. 1998); *Rice v. Montgomery Ward and Co.*, 450 F. Supp. 668 (1978); *Klapper v. Shapiro*, 586 N.Y.S.2d 846. (Sup. 1992). *See Hansen v. Morgan*, 582 F.2d 1214, 1215 (1978): "Standard for determining when a consumer report has been obtained under 'false pretenses' will usually be defined in relation to the permissible purposes of consumer reports;" (15 U.S.C. § 1681q)

III. The Sixth Circuit Affirmed The District Court's Decision To Grant Summary Judgment To Star Bank With No Opportunity For Discovery In Conflict With *Celotex Corp. v. Catrett*, And *Anderson v. Liberty Lobby, Inc.*

There was no discovery in this instant lawsuit. Discovery was stayed at a pretrial conference 2 weeks after

the last Defendants were served. As pro se litigants we understood the preliminary order to mean what it said, literally, that we could not move for discovery until a future motion for summary judgment was filed. The order said ". . . If Plaintiffs believe that they need discovery to respond to any future motions for summary judgment, they shall move."

When the Gonzales Defendants filed a motion for summary judgment, we filed a motion for discovery believing that we were following the preliminary order. We were never notified that Star Bank's motion to dismiss was being converted to a motion for summary judgment. The Gonzales Defendants, in their response, argued that we had not filed a 56(f) affidavit. We did not know that a 56(f) affidavit was required, but we filed one as part of the record. The District Court and the Sixth Circuit never ruled on our motion for discovery and our 56(f) affidavit.

The Sixth Circuit states at page 11 of its decision: "They sought to correct any and all misstatements made by the district court and the various defendants." Our 56(f) affidavit identifies much more than correction of misstatements. We enumerated 31 specific facts which we needed in discovery to establish genuine issues, to prove this instant case, and to support Plaintiffs' Motion For Summary Judgment with affidavits. We also told the court in various memorandums that we needed discovery to resolve Mr. Fusco's conflicting affidavits and determine Mr. Leahy's involvement. We could have obtained a copy of the loan file from Star Bank in discovery because Star Bank had refused our requests for a copy. The Sixth Circuit weighed the evidence and decided that we didn't need <u>any</u> discovery. This decision is in conflict with *Celotex, supra*, 477 U.S. 317: (a): "The plain language of Rule 56(c) mandates the entry of

summary judgment, after adequate time for discovery . . ." and *Anderson, supra*, 477 U.S. 242 at 257: ". . . This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has a full opportunity to conduct discovery." *See White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 232 (6th Cir. 1994): "The subsequent grant of summary judgment to the defendants was therefore issued without any discovery taking place. In light of *Anderson* and *Celotex*, we cannot sustain this result."

The Sixth Circuit has affirmed the District Court's decision to grant summary judgment to Star Bank on the sole evidence of an affidavit of an interested party, James J. Barresi, an employee of Star Bank Corp., whose position is acting counsel for Star Bank. *See Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 408: ". . . the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." *See Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 628 (1944). *See Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 at 468: "It is readily apparent that each of these persons was an interested party." At page 473: "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"

We could not obtain evidence without discovery. *See Haines v. Kerner*, 404 U.S. 519 (1972): "Prisoner's pro se complaint should not have been dismissed without affording him the opportunity to present evidence on his claims."

IV. This Decision Of The Sixth Circuit Is In Conflict With The Statutory Definition Of A Consumer Report Under The FCRA And The Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits.

The District Court ruled and the Sixth Circuit has affirmed that the TRW credit report in our loan file is not a consumer report because it was disseminated from a user to a third party user. The TRW credit report meets the statutory definition for a consumer report, 15 U.S.C. § 1681a(d)(1). It is a written communication issued by a consumer reporting agency, TRW, to Star Bank, a user, which bears on our credit worthiness and was collected and expected to be used to establish our eligibility for credit for a mortgage loan.

This Sixth Circuit decision is in conflict with the following circuits:

The Ninth Circuit in *Hansen v. Morgan*, 582 F.2d 1214, 1215 (1978); the Tenth Circuit in *Heath v. Credit Bureau of Sheridan, Inc.*, 618 F.2d 693 (1980); the Sixth Circuit in *Kennedy v. Border City Savings & Loan Association*, 747 F.2d 367, 369 (1984); the Seventh Circuit in *Ippolito v. WNS, Inc.*, 864 F.2d 440, 441 (7th Cir. 1988); the Fifth Circuit in *St. Paul Guardian Insurance Company v. Johnson*, 884 F.2d 881 (5th Cir. 1989); the Eleventh Circuit in *Yang v. Government Employees Insurance Company*, 146 F.3d 1320, 1325 (11th Cir. 1998).

These circuits support the same proposition set forth in *Comeaux v. Brown & Williamson Tobacco Company*, 915 F.2d 1264, 1274 (9th Cir. 1990):

> "If a consumer reporting agency provides a report based on a reasonable expectation that

> the report will be put to a use permissible under the FCRA then that report is a 'consumer report' under the FCRA and the ultimate use to which the report is actually put is irrelevant to the question of whether the FCRA governs the report's use and the user's conduct."

In the following FCRA cases, involving third party users, the courts did not rule that a consumer report became a non-consumer report when it was disseminated from a user to a third party user: *Hansen, supra*, 582 F.2d at 1216; *Yohay, supra*, 827 F.2d at 968; *Klapper, supra*, 586 N.Y.S.2d at 847; *Rice, supra*, 450 F. Supp. at 668; *Boothe v. TRW Credit Data*, 557 F. Supp. 66, 71 (1982).

By ruling that a consumer report is only a consumer report at the time it is disseminated from a consumer reporting agency such as TRW, to a user, but it is no longer a consumer report when it is disseminated from the user to a third party user, the Sixth Circuit has removed the protection of consumers against third party users.

Our complaint included, *inter alia*, FCRA statutory provisions 15 U.S.C. § 1681b, 15 U.S.C. § 1681n, 15 U.S.C. § 1681o and 15 U.S.C. § 1681q against the users in this case, which would include Star Bank as a user. We clarified in our briefs that 15 U.S.C. § 1681g refers to Star Bank.

V. This Decision Of The Sixth Circuit Is In Conflict With Congressional Intent In Affirming The District Court's Decision That Star Bank Is Not Acting As A Consumer Reporting Agency When It Transfers Consumer Reports To Third Parties Without A Valid Order Of A Court Under The FCRA.

The District Court did not recognize the TRW credit report in our loan file as a consumer report and the District Court disregarded the account verifications from other banks and income tax returns in the file, all transactions and experiences gathered from outside sources by Star Bank which were not part of the transactions and experiences between Star Bank and us.

The District Court ruled that when Star Bank transferred our loan file, including experiences from outside sources, the bank did not become a consumer reporting agency, because it did not transfer a consumer report.

See Freeman v. Southern National Bank, 531 F. Supp. 94 (S.D. Tex. 1982) at 95: "Thus, where the bank, is furnishing information based solely on its own experience with the consumer, the information is not a consumer report and the bank is not in those circumstances a consumer reporting agency."

Our transactions and experiences with Star Bank would only include our accounts, loans and payment history with Star Bank. A TRW credit report, account verifications from other banks and income tax returns would not come under 15 U.S.C. § 1681a(d)(A), an exception to a consumer report.

The District Court also ruled that Star Bank did not become a consumer reporting agency because when the bank transferred the consumer report to another user it became a non-consumer report.

When Star Bank transferred our loan file to Mr. Gonzales, (without an order of a court), the bank made a consumer report from the transactions, experiences and information which -the bank gathered from outside sources to assess our credit worthiness, and the bank became a consumer reporting agency. *See* H.R. 15073, 91st Cong. 2d Sess. (1970) (Congressional Record--Senate, October 9, 1970, at 35941):

> ". . . On the other hand, if a bank or other insured financial institution made a report consisting of information about an individual with whom they have had direct financial transactions and part or all of the information pertained to transactions or experiences which were not between such bank or other financial institution and the person on whom the report was made, then such bank or institution would, in fact, be making a consumer report as defined under section 603(d), and thus would become a consumer reporting agency as defined under section 603(f)."

Also see H.R. 15073, 91st Cong. 2d Sess. (1970) (Congressional Record--Senate, October 9, 1970, at 35942):

> ". . . it was argued, however, that if a complete exemption were granted, banks could in effect establish consumer reporting agencies without being subject to the same restrictions

> which would govern the activities of other consumer reporting agencies not affiliated with a bank."

The District Court granted summary judgment to Star Bank based on the sole evidence of an affidavit of an interested party, James. J. Barresi, an employee of Star Banc Corporation. Mr. Barresi, in his affidavit, states that Star Bank obtains financial and credit worthiness information for the sole purpose of making loans.

Two other employees of Star Bank verified to Plaintiff Marie Hahn that Star Bank sells mortgages and transfers everything in the loan files, including credit reports and other outside information which Star Bank assembles and evaluates, to the other banks or investment groups who purchase the loans. A transcript of this conversation was presented to the District Court. Discovery would have proven that Star Bank sells mortgages, including the loan files, containing the consumer reports, on a regular basis and thus is acting as a consumer reporting agency according to the statutory definition of a consumer reporting agency, 15 U.S.C. § 1681a(f).

The District Court ruled that the transcript would not be admissible in court. We were denied discovery to authenticate the transcript. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986): "We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment."

In reply to the transcript Star Bank did not deny selling mortgages or transferring the loan files and consumer reports with the mortgages. Star Bank attacked the transcript as inadmissible and the competency of their employees, but

didn't argue the issue. *See Celotex, supra*, 477 U.S. at 328: "Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex showing that the named witness' possible testimony raises no genuine issue of material fact." Thus, Star Bank did not show that the transcript did not raise a genuine issue of material fact, that is, whether Star Bank acts as a consumer reporting agency.

With discovery and testimony of witnesses, the jury could have believed our evidence and returned a verdict in our favor. The judge weighed the only evidence which we could present with no discovery, the transcript, and ruled on the sole evidence of an affidavit of an interested party that there was no genuine issue for trial and granted summary judgment to Star Bank. *See Sartor, supra*, 321 U.S. 620: "Summary judgment under Rule 56 of the Rules of Civil Procedure should not have been granted defendant solely upon opinion affidavits of experts who either were officers of defendant or whose interests with respect to the subject matter of the litigation were similar to that of defendant . . ." *See Anderson, supra*, 477 U.S. at 249: ". . . at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

VI. The Sixth Circuit Affirmed The District Court's Decision That There Is No Genuine Issue Of Material Fact For Trial When The Issue In Dispute Is Pertinent To The Tolling Provision Under The FCRA. By So Ruling The Sixth Circuit Has Erroneously Placed A Bar On The Face Of The Complaint.

See the Sixth Circuit's decision at page 7: ". . .The

question surrounding the subpoena's validity in no way relates to any information that Star Bank would be required to disclose under FCRA, even assuming that FCRA's requirements apply to Star Bank. (*See* 15 U.S.C. § 168la(f) for the definition of a 'consumer reporting agency.')"

15 U.S.C. § 1681g(a)(1) states:

> (a) ". . . Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:
>
> (1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request."

The Sixth Circuit incorrectly stated that if Star Bank is a consumer reporting agency, the bank does not have to disclose the truth about a subpoena which is part of our files. Mr. Bonynge, vice president in the mortgage department of Star Bank, misrepresented more than the validity of the subpoena in the file on July 3, 1995 in his conversation with Plaintiff Michael Hahn. On that date, Mr. Hahn returned a phone call from Mr. Bonynge who had sent us a letter asking for updated information for our loan file. As a precaution, Plaintiff Michael Hahn taped the conversation in order to have an accurate record of what was said. Mr. Bonynge, representative for Star Bank, acting as a consumer reporting agency in this instant case, willfully misrepresented to Mr. Hahn that bank counsel looked at the subpoena for what was specifically asked for and took out private and confidential documents.

In discussing the file, Mr. Hahn stated that he was upset that Star Bank had given out our whole loan file. Mr. Bonynge confirmed that Star Bank would not give out a whole file. Under 15 U.S.C. § 1681g(a)(1), he had to disclose the truth, that he himself had given out the entire file in response to the subpoena addressed to him. Then Mr. Bonynge said that Star Bank had received a subpoena and Mr. Hahn said "Yes I know." Until this conversation we believed that our loan papers were obtained by a legitimate process as part of the court proceedings and this conversation reflects our belief. At this time we were put on notice that we weren't being told the truth because we had the file from Mr. Gonzales including numerous private and confidential documents.

The Office of the Comptroller of the Currency sent us to the Clerk of Courts to look for a subpoena on record to Star Bank and what was specifically asked for in the subpoena. When we found no subpoena on record with the court, we filed a lawsuit in October, 1996, against Star Bank. We dismissed that lawsuit in February, 1997, and refiled the instant lawsuit in June, 1997, under the FCRA.

After the first lawsuit was dismissed in February, 1997, and before we filed the second lawsuit in June, 1997, we sent 4 request letters by certified mail to Star Bank requesting a copy of our loan file. The bank responded that when the bank found our file they would go through it and get back to us, which they never did. They did not produce the subpoena until July, 1997, after we filed this instant lawsuit and included Mr. Gonzales in the lawsuit. *See Millstone v. O'Hanlon Reports, Inc.*, 383 F. Supp. 269, 275 (1974): "At no time until this lawsuit was joined and discovery was undertaken did O'Hanlon inform Millstone of the entire amount of information concerning him in O'Hanlon's files."

We discovered when Mr. Bonynge filed his affidavit for Star Bank in this instant lawsuit that he was the party served with the subpoena and Star Bank admitted that he was the one who had produced the file. Mr. Bonynge's affidavit states in relevant parts:

> "2. On or about October 12, 1993, I was served on behalf of Star Bank with a Civil Subpoena, a true and correct copy of which is attached hereto as Exhibit A.
>
> 3. As stated in the Subpoena, the Subpoena requested: "Any and all files, documents or other papers regarding Construction Loan No. 13953, in the name of Michael F. or Maria A. Hahn.'
>
> 4. At the time of the request, Star Bank had in its possession documents responsive to the Subpoena. All the documents in Star Bank's possession had been gathered solely to assess Michael and Maria Hahn's financial status, credit worthiness, and eligibility to receive a construction loan from Star Bank, Loan No. 13593.
>
> 5. Star Bank's loan file was produced in accordance with the Subpoena attached hereto."

In view of this affidavit, specifically # 4, Star Bank knew it was producing a consumer report as a consumer reporting agency, in violation of the FCRA without a valid order of a court. At the time of his submission of this affidavit to the court, we discovered the proof that Mr. Bonynge had

willfully misrepresented and fraudulently concealed: the truth about the subpoena in the file, (which he claimed bank counsel handled, not he); the private and confidential documents in the file, (he admitted in his affidavit that he had produced any and all documents as requested in the subpoena, including the consumer report and other information bearing on our credit-worthiness); and that he had given out the whole file, (he told us that the bank didn't do that). This willful misrepresentation was material to Star Bank's liability, (see 15 U.S.C. § 1681p), because acting as a consumer reporting agency, Star Bank was required to disclose the nature and substance of all information in our file (15 U.S.C. § 1681g(a)(1).) We had no discovery to find out when the loan file was actually given out or if, in fact, a conspiracy existed between Star Bank and Mr. Gonzales.

The Sixth Circuit has also interpreted that the FCRA requirements only apply to Star Bank as a consumer reporting agency, not as a user. This is totally against Congressional intent. *See St. Paul Guardian Insurance Company, supra*, 884 F.2d 881 at 882: "Insurance company was bound to comply with provisions of Fair Credit Reporting Act in its handling of insured's preexisting credit report . . ."

CONCLUSION

The Sixth Circuit affirmed the District Court's decisions pertaining to the FCRA which are contrary to Congressional mandate and undermine the protection of the privacy of consumer reports under the FCRA. By avoiding the FCRA issues of this case the Sixth Circuit has put a bar on the face of the complaint when there is a genuine issue of material fact for trial in dispute.

The Sixth Circuit has deviated from United States

Supreme Court rulings on 42 U.S.C. § 1983 and the Fourteenth Amendment; specifically, color of law, due process, property interests, and inadequacy of state procedures; and granted immunity to private attorneys for misusing state power to violate constitutional rights. The Sixth Circuit sanctioned the ex parte production of a consumer report and ruled that an "appearance" of a court order is valid under the FCRA.

The Sixth Circuit affirmed the District Court's decision to weigh the evidence, with no discovery in this case, and to dismiss this case erroneously on the sole evidence of an affidavit of an interested party. For reasons stated herein, the Petitioners respectfully request that their petition for writ of certiorari be granted.

/s/_____
Michael Hahn
Marie Hahn

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed September 2, 1999]

No. 98-3680

MICHAEL F. HAHN and MARIE HAHN,
Plaintiffs-Appellants,

v.

STAR BANK, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 97-00677--Joseph P. Kinneary, District Judge.

Submitted: August 5, 1999

Decided and Filed: September 2, 1999

Before: JONES, SILER, and GILMAN, Circuit Judges.

OPINION

RONALD LEE GILMAN, Circuit Judge. Michael F. Hahn and Marie Hahn appeal from three adverse rulings of the district court that in the aggregate disposed of all of their claims arising from the alleged improper disclosure of their Star Bank loan file. For the reasons set forth below, we **AFFIRM** the decision of the district court.

I. BACKGROUND

Star Bank approved a loan application submitted by Michael and Marie Hahn in September of 1990. The Hahns used the loan proceeds to build a new house. Because the drywall used in the construction proved to be defective, they filed a lawsuit in the Court of Common Pleas of Franklin County, Ohio against 84 Lumber, the retail seller of the drywall. 84 Lumber impleaded the manufacturer of the drywall, Domtar Gypsum, as a third-party defendant. Domtar is now owned by Georgia-Pacific Corporation ("G-P"). Star Bank was not a party in the state court proceeding.

The suit resulted in a jury verdict in favor of the Hahns. At the conclusion of the trial on October 29, 1993, the attorney for 84 Lumber, John Gonzales, handed the Hahns their loan file that Gonzales had obtained from Star Bank pursuant to a subpoena. The subpoena had requested "[a]ny and all files, documents, or other papers regarding Construction Loan No. 13953, in the name of Michael F. or Maria A. Hahn."

Michael Fusco was the attorney representing the Hahns in the drywall case. Gonzales's affidavit stated that he

had served Fusco with a copy of the subpoena on October 8, 1993. He attached to the affidavit a copy of the October 8, 1993 transmittal letter from himself to Fusco. Fusco's original affidavit asserted that he had no recollection of receiving a copy of the subpoena from Gonzales. In a subsequent affidavit, however, Fusco stated that his prior affidavit was based solely on his recollection of events that had occurred four years previously and that he has not reviewed his files to determine if he had in fact received a copy of the subpoena.

On October 28, 1996, the Hahns filed suit against Star Bank and two of its employees in the United States District Court for the Southern District of Ohio. The Hahns' new counsel was Tobias Elsass. They alleged that Star Bank improperly provided their loan file to Gonzales, and that this conduct constituted a breach of confidentiality, invasion of privacy, defamation, breach of trust, interference with business relations, negligence, the tort of outrage, and emotional distress. Specifically, the Hahns claimed that no subpoena had been issued to Star Bank and that the production of the loan file was therefore improper. Star Bank filed a motion to dismiss on the basis that neither diversity of citizenship nor federal question jurisdiction existed. While the motion was pending, the Hahns voluntarily dismissed the suit on February 10, 1997.

On June 13, 1997, the Hahns, still represented by Elsass, refiled their complaint in the district court. They again named Star Bank as a defendant and added a number of new defendants. The "Star Bank defendants" consist of Star Bank and five of its officers. John M. Gonzales and the law firm in which he is a partner, Crabbe, Brown, Jones, Potts &

Schmidt, will be referred to as the "Gonzales defendants." The G-P defendants consist of G-P, Domtar Gypsum (n/k/a G-P Gypsum), Domtar's lawyer from the drywall action, William B. Leahy, and the law firm in which Leahy is a partner, Thompson, Hine & Flory. The last group of defendants, known as the "84 Lumber defendants," is comprised of 84 Lumber, Pierce-Hardy Real Estate, Inc., and 84 Associates, Inc.

In their refiled complaint, the Hahns alleged violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681-1681u (West & Supp. 1998), their right to privacy under the United States Constitution, and their civil rights under 42 U.S.C. § 1985, as well as numerous causes of action based on state law. Their claims were once again premised upon the theory that no subpoena had ever been issued to Star Bank, thus making the disclosure improper. Based upon this theory, the Hahns' 35-page complaint set forth 13 separate legal theories for recovery and sought $20,000,000 in compensatory and punitive damages against the 15 defendants.

In July of 1997, Star Bank provided the Hahns' counsel with a copy of the subpoena that Gonzales had served on the bank. Pursuant to the "safe harbor" provisions of Rule 11 of the Federal Rules of Civil Procedure, Star Bank requested that the Hahns dismiss their allegedly frivolous action, given that the subpoena was in fact issued to the bank. The Hahns refused to dismiss their lawsuit. One month later, the Star Bank defendants moved for dismissal based on the Hahns' failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Included among the attachments to Star Bank's motion was the original subpoena, which shows that it was received by the bank on October 12, 1993.

The Hahns, though their counsel, filed a memorandum in opposition to the motion and attached a large number of exhibits. The Star Bank defendants' motion was fully briefed and submitted as of September 26, 1997. In November of 1997, discovery was stayed by the magistrate pending a decision on Star Bank's motion. Also in November of 1997, the Hahns' attorney, Elsass, was suspended from the practice of law for reasons unrelated to the Hahns' case. The Hahns have been proceeding *pro se* since that time.

In an opinion dated March 26, 1998, the district court granted Star Bank's motion for summary judgment. A month and a half later, on May 8, 1998, the district court issued an opinion denying the Hahns' motion for leave to amend their complaint to add four new causes of action. It denied the motion to amend on the basis that the claims set forth in the amended complaint failed to state a cause of action, and thus were futile. Finally, on May 11, 1998, the district court issued an opinion dismissing the Hahns' complaint against all of the remaining defendants. The Hahns now appeal these three rulings.

II. ANALYSIS

A. Summary judgment granted in favor of the Star Bank defendants

1. Standard of review

We review *de novo* the district court's grant of summary judgment. *See, e.g., Smith v. Ameritech,* 129 F.3d 857, 863 (6th Cir. 1997). Summary judgment is appropriate when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The judge is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). A genuine issue for trial is presented when there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id* at 252.

2. The Hahns' FCRA claims are barred by the statute of limitations

All claims brought under FCRA must be brought within two years from the date on which liability arises unless the defendant has "wilfully misrepresented any information required under [FCRA] to be disclosed . . ." and such information is "material," in which case the limitation is two years after discovery of the misrepresentation. *See* 15 U.S.C. § 1681p. The Hahns allege that they first discovered that a

copy of their loan file had been produced on October 29, 1993. Yet the Hahns did not file their original action regarding the loan file until three years later, on October 28, 1996. So unless the wilful misrepresentation exception applies, all of the Hahns' claims under FCRA are barred by the two year statute of limitations.

According to the Hahns, they were wilfully misled by Jeff Bonynge, a Vice President of Star Bank, when he represented to them that Star Bank had released the loan file pursuant to a valid subpoena. This conversation occurred on July 3, 1995. The Hahns assert that FCRA requires that the subpoena be an order of the court *(see* 15 U.S.C. § 168lb(a)(1)), and that the relevant subpoena in this case was issued by Gonzales, who is an attorney, not a judge. Under this theory, the Hahns contend that Bonynge specifically misrepresented the fact that the subpoena was valid. The Hahns maintain that they did not learn that the subpoena was invalid (in their view) until Star Bank provided their former counsel Elsass with a copy of the subpoena on July 7, 1997.

Contrary to the Hahns' argument, we find no need to reach the issue of whether they were wilfully misled by Bonynge's statement regarding the subpoena's validity. In the first place, the subpoena issued by Gonzales has every appearance of being "an order of a court," given that it is signed by Gonzales on behalf of the clerk of the court. *See In re Grand Jury Proceedings,* 503 F. Supp. 9, 12 (D.N.J. 1980) (reasoning that an "order of a court" under this section of FCRA may be oral, may be a paper bearing the word "order" that is "signed by a judge or other judicial officer[,] [o]r it may be a subpoena, writ of execution or other process."). Secondly, the tolling language in § 168lp only applies to the

wilful misrepresentation of material information "required under [FCRA] to be disclosed." Bonynge's alleged statement regarding the subpoena does not fit within the statutory language. The question surrounding the subpoena's validity in no way relates to any information that Star Bank would be required to disclose under FCRA, even assuming that FCRA's requirements apply to Star Bank. *(See* 15 U.S.C. § 1681 a(f) for the definition of a "consumer reporting agency.") The Hahns' claimed reliance on whatever Bonynge said regarding the subpoena therefore provides them with no basis to toll the two year statute of limitations.

Accordingly, the Hahns have failed to demonstrate that the wilful misrepresentation tolling exception applies to their case. We therefore hold that all of their claims raised under FCRA are barred by the statute of limitations. *See Rylewicz v. Benton Servs., Ltd.*, 888 F.2d 1175, 1181 (7th Cir. 1989) (holding that a plaintiff must fit within the precise wording of the tolling exception to avoid being barred by FCRA's statute of limitations provision).

We find no inequity in reaching this result. As of October 29, 1993, the Hahns were personally aware of the fact that their loan file, which included a TRW credit report, had been disseminated to 84 Lumber by Star Bank. They admitted that at that very moment they felt humiliated and injured. Their obligation to investigate whatever claims they wished to pursue arose at that time, especially because they were then being actively represented by counsel. Moreover, Gonzales has presented documentary evidence showing that he served their attorney Fusco on October 8, 1993 with a copy of the subpoena that was issued to Star Bank. The Hahns have

been unable to present any evidence contradicting Gonzales's affidavit and corresponding exhibits.

3. The district court did not err in declining to resolve issues regarding the propriety of the subpoena

The Hahns raise numerous challenges regarding the propriety of the subpoena to Star Bank. In their original action they alleged that there was no subpoena because it was not filed with the Court of Common Pleas. Once copies of the subpoena were produced, they contended that the copies were fabricated as allegedly evidenced by the fact that two versions are in the record, each with the signature of the notary Beth Wayne in different places. The Hahns presented a purported handwriting expert who stated in his affidavit that one of the signatures of Beth Wayne might be hers, but not both, although he had not examined any other examples of her signature. Wayne's affidavit, on the other hand, states that both signatures are hers. The Hahns also challenged the alleged date upon which the subpoena was notarized. According to the Hahns, these defects and questions raise triable issues of fact. The district court explicitly declined any ruling on these issues, finding that Star Bank's motion could be resolved without such a ruling.

We find that the district court did not err in declining to resolve the issues raised by the Hahns regarding the details of the subpoena. In particular, we note that the questions raised by the Hahns are irrelevant to the statute of limitations issue discussed above. Like the district court, we believe that the resolution of Star Bank's motion at issue did not require

further exploration into the numerous allegations raised about the subpoena.

4. The Hahns have no valid claims against the individual Star Bank defendants

The Star Bank employees named in the Hahns' complaint include Jerry Grundhofer (the Chief Executive Officer of Star Bank), David Moffett (the Chief Financial Officer of Star Bank), Thomas R. Green (the Statutory Agent for Star Bank), Jeff Bonynge (a Vice President of Star Bank), and Paul Beery (a Vice President of Star Bank). Claims against these individuals do not survive for numerous reasons. First, no individual liability can be premised on FCRA because we have concluded that the FCRA claims are barred by the statute of limitations. *See* Part II.A.2. above. Second, an employee of a corporation has no personal liability for the torts of the corporation unless the individual personally participated in the challenged actions. *See Young v. Featherstone Motors, Inc.*, 124 N.E.2d 158, 166 (Ohio Ct. App. 1954). Finally, the Hahns' complaint fails to sufficiently allege any wrongdoing on the part of the named individuals.

The complaint contains no allegations whatsoever against Grundhofer and Moffett, and therefore the Hahns can maintain no claim against them. Green was named solely because he was the statutory agent for service of process on Star Bank, which is wholly insufficient to state a claim upon which relief can be granted. With respect to Bonynge the only claim against him is that he "wilfully misrepresented that a subpoena existed" and "specifically expressed to plaintiff that he believed that a subpoena existed before

information was disclosed." But Bonynge made the misrepresentation to the Hahns because a subpoena did in fact exist. They thus have no claim against him. Finally, the only contention against Beery is that he was "in charge of their loan at the time of the wrongful release of information." There is no allegation that Beery was personally involved in any tortious conduct by Star Bank, and therefore the Hahns have failed to state a claim against Beery.

For all of these reasons, the district court properly dismissed the Hahns' claims against the individual Star Bank empioyees.

5. The Hahns' constitutional right to privacy and civil rights claims against the Star Bank defendants

This court has held that "the Constitution does not encompass a general right to nondisclosure of private information." *J.P. v. DeSanti,* 653 F.2d 1080, I090 (6th Cir. 198l). Rather, the constitutional right to privacy is limited to certain fundamental rights that are "implicit in the concept of ordered liberty." *Id.* (citations and internal quotation marks omitted). We agree with the district court that the Hahns' asserted interest in the nondisclosure of their loan file is "far afield" from such fundamental rights, and therefore affirm the dismissal of their constitutional right to privacy claim.

The Hahns also raise civil rights claims under 42 U.S.C. §§ 1985(2) and 1985(3). Section 1985(2) relates to conspiracies to interfere with the administration of justice in federal courts, and is clearly inapplicable. An essential prerequisite for an action under § 1985(3), on the other hand,

is evidence that the defendant's conduct was motivated by racial or class-based discriminatory animus in violation of a plaintiff's right to equal protection under the law. *See,* e.g., *Griffin v. Breckenridge,* 403 U.S. 88, 102-03 (1971). As the district court emphasized, "Not only do the Hahns fail to allege or establish such animus, they also fail to allege or establish that they are members of a class warranting the protection of the equal protection doctrine." We agree that these claims were properly dismissed.

6. The district court's decision not to exercise supplemental jurisdiction over the state law claims

The state law causes of action asserted in the Hahn's refiled Complaint against the Star Bank defendants include breach of a contractual duty of confidentiality, invasion of privacy, defamation, breach of trust, interference with business relations, negligence, the tort of outrage, and emotional distress. These counts were drafted and filed by counsel for the Hahns. All of them were dismissed by the district court without prejudice. Given that the district court correctly dismissed the Hahns' federal claims, and with complete diversity of citizenship lacking, it properly rejected supplemental jurisdiction over the state law claims. *See United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726 (1966) ("[I]f the federal claims [supporting supplemental jurisdiction] are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.").

B. Denial of the Hahns' motion for leave to amend their complaint

1. Standard of review

Because the Hahns were proceeding *pro se* when they filed their proposed amended complaint, the district court had to liberally construe their pleading and hold the complaint to a less stringent standard than a similar pleading drafted by attorneys. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). This less stringent standard, however, does not mean that *pro se* plaintiffs are entitled to take every case to trial. *See Pilgrim v. Littlefield, 92* F.3d 413, 416 (6th Cir. 1996). Rule 15(a) of the Federal Rules of Civil Procedure explicitly states that leave to amend a pleading should be "freely given when justice so requires." FED. R. Civ. P. 15(a). The Supreme Court has interpreted this statement to mean that "[i]n the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis* 371 U.S. 178, 182 (1962). The district court denied the Hahns' motion to amend on the basis of the futility of their four new claims, finding that none of them would be able to withstand a motion to dismiss.

On appeal, we generally review a district court's denial of a motion to amend for abuse of discretion. *See LRL Properties v. Portage Metro Housing Auth., 55* F.3d 1097, 1104 (6th Cir. 1995). When the district court bases its

decision on the legal conclusion that the proposed amendment be futile, however, we review the decision *de novo*. *See id.*

2. *The Hahns fail to allege the necessary elements for a procedural due process violation under 42 U.S.C. § 1983*

The Hahns' first new cause of action states that defendants' actions "in obtaining confidential records of the Plaintiffs, using the wrongfully obtained information against Plaintiffs, and generally failing to follow due process of law, has caused damages to the Plaintiffs." These actions allegedly violated their civil rights "for which Plaintiffs assert a cause of action against Defendants based on a denial of procedural due process." In support their claim, the Hahns cite *Messick v. Leavins,* 811 F.2d 1439, 1440 (11 th Cir. 1987), as an example of the type of action they assert. *Messick* involved a cause of action alleged under 42 U.S.C. § 1983 for the deprivation of property without due process of law.

To establish a procedural due process claim pursuant to § 1983, plaintiffs must establish three elements: (1) that they have a life, liberty, or property interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, (2) that they were deprived of this protected interest within the meaning of the Due Process Clause, and (3) that the state did not afford them adequate procedural rights prior to depriving them of their protected interest. *See, e.g., Zinermon v. Burch,* 494 U.S. 113, 125-26 (1990). This court has stated that for the purposes of such claims brought under § 1983, "the plaintiff must plead and prove that state remedies for redressing the wrong are inadequate." *Vicory v. Walton,* 721 F.2d 1062, 1066 (6th

Cir. 1983). In other words, a party may maintain a procedural due process § 1983 case in federal court if he alleges and proves that there was a constitutional violation under color of law and:

1. The state did not have a remedy; or
2. The state had a remedy but it was deemed inadequate; or
3. The state had an adequate remedy in form, both procedurally and in damages, but the state did not apply it or misapplied its remedy.

Haag v. Cuyahoga County, 619 F. Supp. 262, 278-79 (N.D. Ohio 1985), *aff'd* 798 F.2d 1414 (6th Cir. 1986).

The Hahns' proposed amended complaint alleges that the defendants' actions in obtaining their loan file by means of a subpoena violated their rights to procedural due process. This claim was found futile by the district court because (1) they failed to allege why the state procedures relating to the issuance of a subpoena are inadequate, and (2) they did not provide any factual support for their allegations that they were deprived of a life, liberty, or property interest by the defendants' actions.

In the first place, the Hahns provide no support for their claim that the state proceedings were constitutionally inadequate. In fact, the uncontroverted evidence shows that their attorney was timely provided with a copy of the subpoena. Although the Hahns have never conceded this point, and their attorney claims not to remember, neither the Hahns nor their attorney have alleged facts that directly contradict the defendants' evidence. So though it may be true

that the Hahns; attorney did not inform the Hahns of the subpoena's existence, the Hahns cannot now be permitted to bring a constitutional due process claim simply because their attorney failed to utilize the proper state channels available to him to challenge the subpoena.

Secondly, the Hahns claim that they have a property interest in their loan file, based on their implied and actual contracts of confidentiality with Star Bank. In response, Star Bank maintains that its good faith compliance with a facially valid subpoena was entirely proper, regardless of any alleged contract of confidentiality. The district court ruled that because the Hahns had no rights against any of the defendants under FCRA, the Hahns could not demonstrate any property rights warranting protection under the Due Process Clause. Given that the Hahns cannot maintain a FCRA claim against any of the defendants, we affirm the district court's ruling that their due process claim is futile. In addition, we have already rejected their claim based on the theory of a constitutional right to privacy. *See* Part II.A.5. above.

3. The Hahns fail to sufficiently allege a claim for deprivation of a federal right under 42 U.S.C. § 1983

For their second new cause of action, the Hahns claim that the defendants, acting under color of state law, deprived them of their constitutional rights when they "obtained the confidential records of Plaintiffs from defendant Star Bank." In order to establish liability under § 1983 for a cause of action other than a violation of procedural due process, a plaintiff must show that the defendants while (1) acting under color of state law (2) caused the deprivation of a federal right,

constitutional or statutory. *See Kentucky v. Graham,* 473 U.S. 159, 166 (1985) (citing *Monroe v. Pape,* 365 U.S. 167 (1961)). If either element is missing, then a § 1983 claim has not been properly pled. *See Christy v. Randlett,* 932 F.2d 502, 504 (6th Cir. 1991).

In support of the first element, the Hahns claim that the defendants acted under color of state law when Gonzales issued a subpoena, thereby transforming himself into a state actor. They cite the case of *Timson v. Weiner,* 395 F. Supp. 1344 (S.D. Ohio 1975), to substantiate their theory. The *Timson* court noted that the conduct of counsel in representing clients before a state tribunal does not in and of itself constitute action under color of state law for the purposes of § 1983. *See id.* at 1349. But the court ultimately held that the issuance of a subpoena by the Ohio State Personnel Board of Review is an act of the state of Ohio and "that when such a subpoena is caused to be issued by a private litigant or attorney pursuant to the subpoena privilege granted litigants by the State of Ohio, such an act is state action for the purposes of the Fourteenth Amendment and action under color of state law for purposes of 42 U.S.C. § 1983." *Id.* at 1348-49.

In response, the Gonzales defendants rely on the case of *Barnard v. Young,* 720 F.2d 1188 (10th Cir. 1983). *Barnard,* the Tenth Circuit held that a private attorney who caused a subpoena duces tecum to issue was not a state actor for the purposes of § 1983. *See id.* at 1189. The *Barnard* court relied upon the "vast weight of authority that private attorneys, by virtue of being officers of the court, do not act under color of state law within the meaning of section 1983." *Id.* (citing cases from the United States Supreme Court and

the Second, Third, Fourth, Fifth, Seventh, and Tenth Circuits). According to the Tenth Circuit, if "an attorney does not become a state actor merely by virtue of instigating state court litigation, then the attorney does not become a state actor merely by employing state authorized subpoena power." *Id.* (citation omitted).

The district court in the present case was faced with general authority from a sister circuit versus a district court decision applying Ohio law, which is the same state that authorized the Gonzales subpoena. Placed in such a predicament, the district court assumed for the purposes of its opinion that *Timson* was the proper law to apply. This is a matter of first impression in this circuit. Because we are of the opinion that *Timson* was wrongly decided, we now put this circuit on record as holding that a private attorney issuing a subpoena does not become a state actor for the purposes of § 1983. In, doing so, we adopt the reasoning set forth in *Barnard*. *See* 720 F.2d at 1189.

The second element requires a plaintiff to establish the deprivation of a federal right. This the Hahns completely failed to do. They offered only a conclusory statement that "Plaintiffs have been deprived of their rights, privileges and immunities secured by the Constitution and the laws of the United States of America to which they are entitled as citizens of said country by the actions of the Defendants and for which they seek restitution pursuant to 42 U.S.C. § 1983 against the Defendants." We concur in the district court's conclusion that these bald assertions regarding a general deprivation of civil rights are insufficient to withstand a motion to dismiss. *See, e.g., Smith v. Rose,* 760 F.2d 102, 106 (6th Cir. 1985).

4. The Hahns fail to sufficiently allege the elements of a claim for the intentional infliction of emotional distress

The Hahns' third new cause of action alleges the tort of intentional infliction of emotional distress against all of the defendants. According to the Supreme Court of Ohio, the tort of intentional infliction of emotional distress is characterized as follows: "'One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress[.]'" *Yeager v. Local Union 20*, 453 N.E.2d 666, 671 (Ohio 1983) (quoting RESTATEMENT (SECOND) OF TORTS § 46(1) (1965)). In their proposed amended complaint, the Hahns aver that "the actions of the Defendants . . . have caused emotional distress, pain, suffering and damages to the Plaintiffs." The Hahns do not allege, however, that the actions of the defendants were outrageous, or that the resulting emotional distress to the Hahns was severe. Accordingly, the district court found that the Hahns failed to set forth all of the elements of a *prima facie* case under Ohio law. We concur with this ruling.

5. The Hahns fail to state a claim for abuse of process

The Hahns' fourth and final proposed cause of action raises a claim for abuse of process against all of the defendants, in particular, they contend that the defendants' actions "in issuing no subpoena or an invalid subpoena and acquiring personal and privileged information of the Plaintiffs is an abuse of process." To establish a claim for abuse of process under Ohio law, a plaintiff must allege the following:

"(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process." *Yaklevich v. Kemp, Schaefer & Rowe Co.*, 626 N.E.2d 115, 116 (Ohio 1994). Under the second element, "'there is no liability [for abuse of process] where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.'" *Id.* at 118 n.2 (quoting WILLIAM L. PROSSER & PAGE KEETON, THE LAW OF TORTS § 121, at 898 (5th ed. 1984)) (brackets in original). Using this analysis, the district court properly concluded that the Hahns fail to state a cause of action for abuse of process. The Hahns simply made conclusory allegations regarding the defendants' ulterior motives with no facts to support those contentions. Accordingly, we affirm the district court's determination that this claim was futile.

C. The district court's dismissal of all remaining claims against the G-P defendants, the 84 Lumber defendants, and the Gonzales defendants

1. Standard of review

A district court's dismissal of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure is reviewed *de novo*. *See Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir.1997). All well-pled allegations of the complaint are taken as true. *See id.* "A complaint must contain either direct or inferential allegations with respect to all material elements necessary to sustain a recovery under some viable

legal theory." *Id.* In sum, we conduct essentially the same analysis as the district court in that "we take the plaintiff's factual allegations as true and if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claims that would entitle it to relief, then . . . dismissal is proper." *Id.* (internal quotation marks omitted) (ellipses in original).

2. *FCRA claims against the G-P defendants, the 84 Lumber defendants, and the Gonzales defendants are barred by the statute of limitations*

The Hahns allege that these defendants violated FCRA by (1) negligently and wilfully obtaining a consumer report for an impermissible purpose under 15 U.S.C. § 1681b, (2) failing to abide by 15 U.S.C. § 1681d, which deals with the disclosure of investigative consumer reports, and (3) knowingly and wilfully obtaining information about the Hahns from a consumer reporting agency under false pretenses in violation of 15 U.S.C. § 1681q. They further contend that these defendants, through the actions of Star Bank, violated 15 U.S.C. § 1681g, which delineates a consumer reporting agency's disclosure requirements with respect to consumers. All of the Hahns' FCRA claims against these defendants are barred by the statute of limitations for the same reasons as set forth in Part II.A.2. above.

3. Constitutional right to privacy and civil rights claims against the G-P defendants, the 84 Lumber defendants, and the Gonzales defendants

The Hahns raise the same constitutional right to privacy and civil rights claims against these defendants as they did against the Star Bank defendants. These claims do not state a cause of action upon which relief can be granted for the same reasons as discussed in Part II.A.5. above.

4. State law causes of action against the G-P defendants, the 84 Lumber defendants, and the Gonzales defendants

The district court did not abuse its discretion in declining to exercise supplemental jurisdiction over the state law claims for the same reasons given in Part II.A.6. above. *See Gibbs,* 383 U.S. at 726.

D. The Hahns' contention that they were denied the opportunity for discovery

1. Standard of review

Trial courts have broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined. *See Landis v. North Am. Co.,* 299 U.S. 248, 254-55 (1936). When reviewing a district court's decision to limit discovery, we will intervene only if the decision was an abuse of discretion resulting in substantial prejudice. *See Emmons v. McLaughlin,* 874 F.2d 351,356-57 (6th Cir. 1989).

2. The district court did not abuse its discretion in limiting discovery

The Hahns assert that the district court erred in not allowing them the opportunity to conduct discovery. In a preliminary order dated December 1, 1997, the district court declared that "discovery will be stayed pending resolution of the pending Motion to Dismiss or for summary judgment, which is now at issue. If plaintiffs believe that they need discovery to respond to any future motions for summary judgment, they shall so move." Despite being represented by counsel at that time, the Hahns did not state any need for discovery until April 21, 1998, which was a month after the district court had granted summary judgment in favor of Star Bank. More importantly, the facts that the Hahns claim that they needed to discover have no relevance to the dispositive legal issues in question. They sought to correct any and all misstatements made by the district court and the various defendants. Because the information they were seeking would not have salvaged their claims, substantial prejudice did not result from the district court's limitation on discovery.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the decision of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed May 11, 1998]

No. C-2-97-677

MICHAEL F. HAHN, et al.,
Plaintiffs,

v.

STAR BANK, CENTRAL OHIO, ATIMA, et al.,
Defendants.

OPINION AND ORDER

This matter is before the Court on three separate motions to dismiss. The first motion the Court must consider is the motion to dismiss Plaintiffs' complaint filed by Defendants Georgia-Pacific Corporation, Domtar Gypsum (nka G-P Gypsum Corp.), Thompson Hine & Flory LLP and William B. Leahy (collectively, the "G-P Defendants"). The second motion before the Court is the motion to dismiss Plaintiffs' complaint by Defendants 84 Lumber & Home Center, Pierce-Hardy Real Estate, Inc., and 84 Associates, Inc. (collectively, the "84 Lumber Defendants"). The third

motion before the Court is a motion to dismiss Plaintiffs' complaint filed by Defendants John M. Gonzales and the law firm of Crabbe, Brown, Jones, Potts & Schmidt (collectively, the "Gonzales Defendants"). For the reasons set forth below, the Court **GRANTS** the G-P Defendants' motion, the Court **GRANTS** the 84 Lumber Defendants' motion and the Court **GRANTS** the Gonzales Defendants' motion to dismiss. All other motions are **MOOT**.

I. FACTS

As noted in this Court's prior Opinion and Order, the following background is not in dispute. Star Bank approved a loan application for Plaintiffs. Plaintiffs used the money to build a new house.

Plaintiffs were not satisfied with the drywall used in building their new house and filed a lawsuit in the Common Pleas Court of Franklin County. Plaintiffs sued 84 Lumber, the company from whom they purchased the drywall, and Domtar Gypsum, the manufacturer of the drywall. Star Bank was not a party to the state court action.

On October 29, 1993, during the course of the litigation, the attorney for 84 Lumber, John Gonzales, obtained a copy of Plaintiffs' loan file from Star Bank.[1] After the state-court jury rendered a verdict, Mr. Gonzales gave

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[1] To obtain the loan file, Mr. Gonzales allegedly issued a subpoena to Star Bank. Plaintiffs raise numerous issues relating to the propriety of the subpoena. The Court need not address these issues to reach its conclusion.

Plaintiffs' attorney numerous documents obtained by 84 Lumber during discovery, including the loan file.

On the basis of these facts, Plaintiffs brought this action essentially alleging that Star Bank improperly disclosed the confidential information contained in the loan file. Plaintiffs bring claims under both federal and state law.

In their Complaint, Plaintiffs' eleventh and twelfth cause of action are essentially claims for violations of the federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 (1994). In their third, fourth, and thirteenth causes of action, Plaintiffs bring claims for the violation of their constitutional rights, including the right to privacy. Plaintiffs' remaining causes of action are based on state law.

II. STANDARD OF REVIEW

All three groups of Defendants move to dismiss Plaintiffs' Complaint under Federal Rule of Civil Procedure ("Rule") 12(b) (6) for failure to state a claim upon which relief can be granted. The purpose of a motion under Rule 12(b) (6) is to test the sufficiency of the complaint. When considering a motion to dismiss pursuant to Rule 12(b) (6), a court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded allegations in the complaint as true. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The court will grant a motion for dismissal under Rule 12(b) (6) only if there is an absence of law to support a claim of the type made, or of facts sufficient to make a valid claim, or if on the face of the complaint there is an insurmountable bar to relief indicating that the plaintiff does

not have a claim. See generally Rauch v. Day & Night Mfg., 576 F.2d 697, 702 (6th Cir. 1978); Ott v. Midland-Ross Corp., 523 F.2d at 1367, 1369 (6th Cir. 1975); Brennan v. Rhodes, 423 F.2d 706 (6th Cir. 1970).

In this case, Plaintiffs are proceeding pro se. A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972); see also Estelle v. Gamble, 429 U.S. 97, 106 (1976). A court should make a reasonable attempt to read the pleadings to state a valid claim on which the plaintiff could prevail, despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with the pleading requirements. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). This standard does not mean, however, that pro se plaintiffs are entitled to take every case to trial. See Pilgrim v. Littlefield, 92 F.3d 413, 416 (6th Cir. 1996). Indeed, courts should not assume the role of advocate for the pro se litigant. See Hall, 935 F.2d at 1110.

III. ANALYSIS

As noted above, Plaintiffs assert only five federal causes of action in their Complaint. The third, fourth and thirteenth causes of action are constitutional claims that the Defendants violated Plaintiffs' right to privacy. Plaintiffs' eleventh and twelfth causes of action are brought pursuant to the federal Fair Credit Reporting Act in which Plaintiffs claim that the Defendants violated the act. The Court will first

examine Plaintiffs' federal claims under the FCRA and then examine Plaintiffs' constitutional claims.

A. Alleged Violations of the FCRA

Plaintiffs bring two causes of action under the FCRA. First, Plaintiffs claim that Defendants violated the FCRA by (1) negligently and willfully obtaining a consumer report for an impermissible purpose under 15 U.S.C. § 1681b; (2) violating 15 U.S.C. § 1681d; and (3) knowingly and willfully obtaining information from Plaintiffs from a consumer reporting agency under false pretenses in violation of 15 U.S.C. § 1681q. (See Pls.' Compl. at ¶ 84.) Second, Plaintiffs claim that Defendants, through the actions of Star Bank, violated 15 U.S.C. § 1681g.

Generally, under the FCRA, a party is subject to liability only if it is a "consumer reporting agency." In an Opinion and Order filed on March 26, 1998, this Court held that Star Bank is not a "consumer reporting agency" under the FCRA. Thus, the Court found that Star Bank is not liable for the alleged violations of the FCRA under Plaintiffs' eleventh and twelfth causes of action.

Under Plaintiffs' theory of liability for the remaining Defendants, Defendants violated the FCRA by being "users" of a "consumer report." (Pls.' Compl. at ¶ 42.) Plaintiffs further allege that "users" are "those who can be held liable for failing to comply with the [FCRA] including the person or entity which is the ultimate destination of a credit report as well as a person who acquires a credit report for another. If a user requests information for a purpose not permitted by the [FCRA] while representing to the reporting agency that the

report will be used for a permissible purpose, the user may be subject to civil liability for obtaining information under false pretenses." (Id. (citing Zamora v. Valley Fed. Savings & Loan Ass'n, 811 F.2d 1368, 1370 (10th Cir. 1987)).) Apparently, then, Plaintiffs' theory is that Defendants are liable as users under the FCRA for receiving a consumer report that was obtained in violation of the FCRA.

However, in context, Zamora also states that:

> 15 U.S.C. § 1681q imposes criminal liability upon any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses. 15 U.S.C. § 1681n provides a private cause of action against any person who willfully fails to comply with any "requirement" of the FCRA. Violation of § 1681q provides a basis for civil suit pursuant to § 1681n. . . .
>
> Whether a consumer report has been obtained under false pretenses will ordinarily be determined by reference to the permissible purposes for which consumer reports may be obtained, as enumerated in § 1681b. . . . A consumer reporting agency may only issue a report for the purposes listed in § 1681b. Accordingly, if a user requests information for a purpose not permitted by § 1681b while representing to the reporting agency that the report will be used for a permissible purpose,

> the user may be subject to civil liability for obtaining information under false pretenses.

Zamora, 811 F.2d at 1370 (citations omitted). Thus, in order for one to be held liable as a user, one must obtain a consumer report on a consumer from a consumer reporting agency under false pretenses. See id.

In this case, Plaintiffs' theories are without merit. Plaintiffs cannot show that the loan file in question was a "consumer report." "Consumer report" is defined as follows:

> The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for -- (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) other purposes authorized under section 1681b of this title. The term does not include (A) any . . . report containing information solely as to transactions or experiences between the consumer and the person making the report. . . .

15 U.S.C. § 1681(d). This definition also has four elements, each of which must be present for a report to fall within the

coverage of the Act: (1) There must be a communication of information (2) by a consumer reporting agency, as defined in the Act, (3) which bears on a consumer's credit status or general reputation, and (4) which is used or is expected to be used in the determination of the consumer's eligibility for credit, employment, insurance, or other commercial benefit specified in the Act.

Plaintiffs cannot show that a consumer reporting agency made a communication to the Defendants. Defendants allegedly received the Plaintiffs' loan file from Star Bank -- an entity which this Court found is not a consumer reporting agency. Further, in their Complaint, Star Bank is the only Defendant alleged to be a consumer reporting agency. Accordingly, the Court finds that Plaintiffs' loan file allegedly turned over from Star Bank to Defendants is not a "consumer report."

The FCRA imposes liability only for "dissemination of consumer credit reports by consumer reporting agencies." Ippolito v. WNS, Inc., 864 F.2d 440, 448 n.8 (7th Cir. 1988). Because a consumer report is not involved in this case, the Court cannot hold Defendants liable under the FCRA. Therefore, Plaintiffs' eleventh cause of action in which Plaintiffs claim that Defendants violated, among others, §§ 1681b, 1681d and 1681q fails to state a claim upon which relief can be granted.

Furthermore, Defendants can in no way be held liable for violations of 15 U.S.C. § 1681g as alleged in Plaintiffs' twelfth cause of action. Indeed, its plain language, § 1681g only applies to "consumer reporting agencies." In no way are the Defendants "consumer reporting agencies."

Consequently, the Court finds that Plaintiffs fail to state a claim in regards to their twelfth cause of action under § 1681g.

Therefore, Plaintiffs fail to state claims under the FCRA. The Court **GRANTS** the motions to dismiss filed by the three groups of Defendants with respect to Plaintiffs' eleventh and twelfth causes of action.

B. Alleged Violations of Plaintiffs' Constitutional Privacy Rights

In their third, fourth and thirteenth causes of action, Plaintiffs allege that Defendants violated their constitutional right to privacy and their civil rights by disclosing the loan file. These claims must fail.

First, the Sixth Circuit held that "the Constitution does not encompass a general right to nondisclosure of private information." J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981). The constitutional right to privacy is limited to certain "fundamental" rights that are "implicit in the concept of ordered liberty." Id. Plaintiffs' asserted interest in the nondisclosure of the loan file is "far afield" from such fundamental rights. See id. Accordingly, their claims under the constitutional right to privacy fail.

In addition, Plaintiffs' civil rights claims, brought under 42 U.S.C. §§ 1985(2) and 1985(3), fail. Section 1985(2) relates to conspiracies to interfere with the administration of justice in federal courts and is clearly inapplicable in this case. See, e.g., Willing v. Lake Orion Community Sch. Bd. of Trustees, 924 F. Supp. 815, 819

(E.D. Mich. 1996). Moreover, an essential prerequisite for an action under § 1985(3) is proof that the defendant's conduct was motivated by racial or class based discriminatory animus in violation of a plaintiff's right to equal protection under the laws. See Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971); Volunteer Med. Clinic v. Operation Rescue, 948 F.2d 218, 223-24 (6th Cir. 1991). Not only do Plaintiffs fail to allege or establish such animus, they also fail to allege or establish that they are members of a class warranting the protection of the equal protection doctrines. Accordingly, Plaintiffs fail to establish any legal entitlement to relief for these causes of actions. The Court **GRANTS** each of the Defendants' motions to dismiss and dismisses the Plaintiffs' third, fourth and thirteenth causes of action.

C. No Jurisdiction Over State Law Claims

There are two potential bases for the Court's jurisdiction over Plaintiffs' state law claims. The first potential basis for jurisdiction is diversity jurisdiction. Diversity jurisdiction requires complete diversity of parties; the citizenship of all of the plaintiffs must be diverse from the citizenship of all of the defendants. See 28 U.S.C. § 1332 (1996); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 (1978); Safeco Ins. Co. v. City of White House, 36 F.3d 540, 545 (6th Cir. 1994). In this case, the Plaintiffs' complaint lists Ohio as the citizenship of Plaintiffs and of the vast majority of defendants. Thus, there is no diversity jurisdiction in this case.

Second, provided the Court has federal question jurisdiction over any of the Plaintiffs' federal law claims, the Court might have supplemental jurisdiction over the Plaintiffs'

state law claims. See Lyon v. Quality Courts United, 249 F.2d 790, 795 (6th Cir. 1988). The Court, however, dismissed all of the Plaintiffs' federal law claims against the Defendants. Accordingly, the Court rejects supplemental jurisdiction over the Plaintiffs' state law claims against the Defendants. See United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726-27 (1965) ("[I]f the federal claims (supporting supplemental jurisdiction) are dismissed before trial, even though not insubstantial in the jurisdictional sense, the state claims should be dismissed as well."). The Court **GRANTS** the Defendants' motion for summary judgment as it relates to Plaintiffs' state law causes of action against the Defendants. The Court **DISMISSES** the Plaintiffs' state law causes of action **WITHOUT PREJUDICE**.

IV. CONCLUSION

Upon consideration and being duly advised, the Court **GRANTS** the G-P Defendants' motion to dismiss, the Gonzales Defendants' motion to dismiss and the 84 Lumber Defendants' motion to dismiss. (See Doc. ## 40, 48, 54.) All other motions are **MOOT**. The Court **DISMISSES WITH PREJUDICE** Plaintiffs' third, fourth, eleventh, twelfth and thirteenth causes of action against all remaining Defendants. The Court **DISMISSES WITHOUT PREJUDICE** Plaintiffs' first, second, fifth, sixth, seventh, eighth, ninth and tenth causes of action against all remaining Defendants.

This case is **TERMINATED**.

IT IS SO ORDERED.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed May 8, 1998]

No. C-2-97-677

MICHAEL F. HAHN, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
STAR BANK, CENTRAL OHIO,	)
ATIMA, et al.,	)
Defendants.	)
	)

OPINION AND ORDER

This matter is before the Court on a number of different motions. The primary set of motions before the Court, however, relates to Plaintiffs' motion for leave to amend their complaint to add four new causes of action. (See Doc. # 44.)

In their original Complaint, Plaintiffs Michael and Marie Hahn sued a total of fifteen defendants alleging numerous causes of action. In an Opinion and Order filed March 28, 1998, the Court dismissed six defendants, the

"Star Bank Defendants," including Star Bank, Central Ohio, Atima; Thomas R. Green; Jerry Grundhofer; David Moffett; Jeff Bonynge; and Paul Berry. If the Court grants Plaintiffs' motion for leave to amend their complaint, however, the Star Bank Defendants will again be parties to Plaintiffs' lawsuit.

For the Court's convenience, the Court will separate the nine remaining defendants into three other groups. The first group of defendants, the "Gonzales Defendants," includes John M. Gonzales and the law firm of Crabbe, Brown, Jones, Potts & Schmidt. The second group of defendants, the "G-P Defendants," includes Georgia-Pacific Corporation, Domtar Gypsum (nka G-P Gypsum Corp.), Thompson Hine & Flory LLP and William B. Leahy. The third and final group of defendants, the "84 Lumber Defendants," includes 84 Lumber & Home Center, Pierce-Hardy Real Estate, Inc., and 84 Associates, Inc.

All four groups (i.e., the Star Bank Defendants, the Gonzales Defendants, the G-P Defendants and the 84 Lumber Defendants) move to strike Plaintiffs' motion for leave to amend their complaint. Further, all four groups filed memoranda contra to Plaintiffs' motion. Plaintiffs filed three motions to strike requesting the Court strike from the record the 84 Lumber Defendants' memorandum contra, the Star Bank Defendants' memorandum contra and the Gonzales Defendants' memorandum contra to Plaintiffs' motion for leave to amend.

For the reasons set forth below, the Court **DENIES** Plaintiffs' motion for leave to amend. (See Doc. # 44.) The Court finds that allowing Plaintiffs to amend their complaint would be futile because Plaintiffs' proposed amended

complaint fails to state claims upon which relief can be granted. Because the Court did not grant Plaintiffs' motion for leave to amend, the Court **ORDERS** the Clerk of Courts (1) to **STRIKE** from the record Plaintiffs' proposed Amended Complaint which was inadvertently file-stamped in this case, (see Doc. # 76), and (2) to **CONVERT** the document into an exhibit attached to Plaintiffs' notice to the Court, (see Doc. # 75). Further, the Court finds that the four motions to strike Plaintiffs' motion for leave to amend filed by all four groups of Defendants are **MOOT**. (See Doc. ## 58, 60, 62, 63.) In addition, the Court **DENIES** Plaintiffs' three motions to strike the Star Bank Defendants' memorandum contra, the 84 Lumber Defendants' memorandum contra and the Gonzales Defendants' memorandum contra. (See Doc. ## 81, 84, 91.) The Star Bank Defendants are hereby **DISMISSED** from this case in accordance with this Court's prior Opinion and Order. (See Doc. # 74.) Finally, the Court informs the remaining parties that the Court shall issue an Opinion and Order resolving the four remaining pending motions on this Court's docket, including the motion to dismiss by the G-P Defendants, the motion to dismiss by the 84 Lumber Defendants, the motion to dismiss by the Gonzales Defendants and the motion for summary judgment by Plaintiffs. (See Doc. ## 40, 48, 54, 72.) The motion for summary judgment recently filed by the Gonzales Defendants is not yet ripe. (See Doc. # 83.)

I. FACTS

As noted in this Court's prior Opinion and Order, the following background is not in dispute. Star Bank approved a loan application for Plaintiffs. Plaintiffs used the money to build a new house.

Plaintiffs were not satisfied with the drywall used in building their new house and filed a lawsuit in the Common Pleas Court of Franklin County. Plaintiffs sued 84 Lumber, the company from whom they purchased the drywall, and Domtar Gypsum, the manufacturer of the drywall. Star Bank was not a party to the state court action.

On October 29, 1993, during the course of the litigation, the attorney for 84 Lumber, John Gonzales, obtained a copy of Plaintiffs' loan file from Star Bank. To obtain the loan file, Gonzales allegedly issued a subpoena to Star Bank. After the state-court jury rendered a verdict, Mr. Gonzales gave Plaintiffs' attorney numerous documents obtained by 84 Lumber during discovery, including the loan file.

On the basis of these facts, Plaintiffs brought this action essentially alleging that Star Bank improperly disclosed the confidential information contained in the loan file. Plaintiffs bring claims under both federal and state law.

In their Complaint, Plaintiffs' eleventh and twelfth cause of action are essentially claims for violations of the federal Fair Credit Reporting Act ("FCRA"). In their third, fourth, and thirteenth causes of action, Plaintiffs bring claims for the violation of their constitutional rights, including the right to privacy. Plaintiffs' remaining causes of action are based on state law.

Plaintiffs now seek leave to amend their Complaint to add four new causes of action. Their proposed fourteenth and fifteenth causes of action are civil rights claims based upon an

alleged denial of procedural due process and on 42 U.S.C. § 1983. The two other causes of action are state law claims.

Before resolving Plaintiffs' motion for leave to amend, the Court must resolve a number of peripheral issues, including motions to strike Plaintiffs' motion for leave to amend filed by all four groups of Defendants.

I. MOTIONS TO STRIKE PLAINTIFFS' MOTION FOR LEAVE TO AMEND

All four groups of Defendants move to strike Plaintiffs' motion for leave to amend. The basis for the Defendants' motions is that Plaintiffs failed to file either a memorandum in support of their motion or a copy of their proposed amended complaint. (See Doc. ## 58, 60, 62, 63.) On February 27, however, Plaintiffs submitted briefs in which they stated that, as pro se litigants, they were unaware of the requirements that they needed to file a memorandum in support. (See Doc. ## 64 at 2; 65 at 2; 66 at 2.) Further, along with their briefs, Plaintiffs filed a memorandum in support of their motion for leave to amend and a copy of their proposed First Amended Complaint. (See Doc. ## 64, Ex. A; 65, Ex. A; 66, Ex. A.) Finally, all four groups of Defendants eventually filed a memorandum contra to Plaintiffs' motion to amend. (See Doc. ## 77, 78, 80, 87.) Accordingly, the Court finds that the basis for Defendants' motions to strike no longer exists. Defendants, motions to strike are **MOOT**. (See Doc. ## 58, 60, 62, 63.)

III. PLAINTIFF'S MOTION FOR LEAVE TO AMEND THEIR COMPLAINT

Having disposed of the motions to strike, the Court will now consider Plaintiffs motion for leave to amend their complaint pursuant to Federal Rule of Civil Procedure ("Rule") 15. Before proceeding to the merits of Plaintiffs' motion, however, the Court must consider a preliminary matter in the form of three motions to strike filed by Plaintiffs.

A. Motions to Strike Defendants' Memorandum Contra

On April 7, 1998, Plaintiffs filed a motion to strike the Star Bank Defendants' memorandum contra to Plaintiffs' motion for leave to amend their complaint. (See Doc. # 81.) On April 13, 1998, Plaintiffs filed a motion to strike the 84 Lumber Defendants' memorandum contra to Plaintiffs' motion for leave to amend their complaint. (See Doc. # 84.) On April 23, 1998, Plaintiffs filed a motion to strike the Gonzales Defendants' memorandum contra to Plaintiffs' motion for leave to amend their complaint. (See Doc. # 91.) The crux of Plaintiffs' argument in each motion is that the Star Bank Defendants, the 84 Lumber Defendants and the Gonzales Defendants filed each of their memorandum contra too late and did not ask for an extension of time to file their memorandum contra. Although Plaintiffs are correct that all three sets of defendants should have asked for leave to file their memorandum contra after the time allowed by the Local Rules expired, the Court finds that Plaintiffs were not prejudiced by the delay. In its prior rulings, the Court overlooked a great many of Plaintiffs' procedural defects and

will now afford the same courtesy to the Defendants. In addition, Plaintiffs filed a reply memorandum to each of the Defendants' memorandum contra. Accordingly, the Court finds that Plaintiffs suffered no undue prejudice by the technical delay on the part of the Star Bank Defendants, the 84 Lumber Defendants and the Gonzales Defendants in filing their memoranda contra late. The Court **DENIES** all three of Plaintiffs' motions to strike, including the motions to strike the Star Bank Defendants' memorandum contra to Plaintiffs' motion for leave to amend, the 84 Lumber Defendants' memorandum contra to Plaintiffs' motion for leave to amend, and the Gonzales Defendants' memorandum contra to Plaintiffs' motion for leave to amend. (See Doc. ## 81, 84, 91.)

As an aside, Plaintiffs note that the 84 Lumber Defendants cite to an unpublished opinion in their brief, Smith v. Wilkinson,[1] without attaching a copy of that opinion for the Court (and the Plaintiffs) in violation of Local Rule 7.2(b) (4). Because Plaintiffs have been prejudiced by not receiving a copy of this unpublished opinion, the Court will not consider the 84 Lumber Defendants' arguments regarding Smith.

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[1] The 84 Lumber Defendants cited the case as "Smith v. Wilkensen, 108 F.3d 1377 (6th Cir. 1997) [sic]." (Doc. # 77 at 2.) The correct cite for this case is Smith v. Wilkinson, Nos. 95-4014 and 96-3172, 1997 WL 117046, at *2 (6th Cir. Mar. 13, 1997).

B. Plaintiffs' Motion for Leave to Amend

Having disposed of that preliminary matter, the Court can turn its attention to the merits of Plaintiffs' motion. Plaintiffs filed their original complaint on June 13, 1997. On December 30, 1997, Plaintiffs filed a motion to amend their complaint pursuant to Rule 15.

1. Rule 15

Rule 15 allows a party to amend its pleadings "once as a matter of course at any time before a responsive pleading is served. . . ." Fed. R. Civ. P. 15(a). Because the 84 Lumber Defendants filed an Answer on August 8, 1997, the Court must look to another portion of Rule 15(a). In such a case, Rule 15(a) provides, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Id.

The Supreme Court interpreted the standards set forth in Rule 15 in Foman v. Davis, 371 U.S. 178, 182 (1962). The Supreme Court stated that when a district court considers a motion to amend, the district court should bear in mind that:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. . . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any

> apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. -- the leave sought should, as the rules require, be "freely given."

Id. (quoting Fed. R. Civ. P. 15(a)). Thus, unless the Court finds some type of improper behavior on the part of Plaintiffs or finds that allowing Plaintiffs to amend their complaint would be futile, the Court must grant Plaintiffs leave to amend their
complaint.

2. Plaintiffs' Proposed Amendments

Plaintiffs' proposed First Amended Complaint adds four new causes of action to their original, thirteen-count Complaint. In their fourteenth cause of action, Plaintiffs claim that Defendants alleged actions "in obtaining confidential records of the Plaintiffs, using the wrongfully obtained information against Plaintiffs, and generally failing to follow due process of law, has caused damages to the Plaintiffs." (Pls.' Proposed First Am. Compl. at ¶ 102.) Plaintiffs allege that these actions violate their civil rights "for which Plaintiffs assert a cause of action against Defendants based on a denial of procedural due process." (Id. at ¶ 103 (citing Messick v. Leavins, 811 F.2d 1439 (11th Cir. 1987)) .)

Plaintiffs propose a fifteenth cause of action against Defendants for alleged violations of 42 U.S.C. § 1983 (1994). (See Pls.' Proposed First Am. Compl. at ¶ 106.) Specifically, Plaintiffs allege that Defendants, acting under color of state law, deprived Plaintiffs of their constitutional rights when they "obtained the confidential records of Plaintiffs from defendant Star Bank." (Id.)

In their sixteenth cause of action, Plaintiffs bring a claim for the tort of intentional infliction of emotional distress ("IIED"). (Id.) at ¶ 110.) In their seventeenth and final cause of action, Plaintiffs bring an abuse of process claim against the Defendants. In particular, Plaintiffs allege that Defendants' actions "in issuing no subpoena or an invalid subpoena and acquiring personal and privileged information of the Plaintiffs is an abuse of process." (Id. at ¶ 112.)

All four groups of Defendants claim that amendment of the original complaint would be futile. The Sixth Circuit held that futility exists when the proposed amended complaint could not withstand a motion to dismiss. See Neighborhood Dev. Corp. v. Advisory Council on Historic Preservation, 632 F.2d 21, 23 (6th Cir. 1980). The 84 Lumber Defendants claim that permitting Plaintiffs to amend their complaint would prejudice all Defendants. Further, the 84 Lumber Defendants claim that the four new causes of action restate claims previously brought by Plaintiffs. Finally, the 84 Lumber Defendants claim that Plaintiffs' two new proposed federal claims are barred by the statute of limitations. Likewise, the Star Bank Defendants claim that the four new causes of action restate claims previously brought by Plaintiffs. Similarly, the G-P Defendants assert that permitting Plaintiffs to amend their complaint would be futile

because their amended complaint fails to state a claim against the Defendants. Finally, the Gonzales Defendants echo the reasons given by the other groups of Defendants in opposing Plaintiffs' motion for leave to amend.

The Court agrees with Defendants. As the Court will explain below, allowing the Plaintiffs to amend their complaint would be futile. The new causes of action proposed by Plaintiffs fail to state claims upon which relief can be granted.

3. Plaintiffs' Proposed Civil Rights Claims

In Plaintiffs' proposed fourteenth cause of action, Plaintiffs claim that Defendants violated their civil rights. In particular, Plaintiffs apparently allege that Defendants denied them due process by obtaining Plaintiffs' confidential records. Plaintiffs cite to Messick v. Leavins, 811 F.2d 1439, 1440 (11th Cir. 1987), as an example of the type of action they bring. Messick is a 42 U.S.C. § 1983 cause of action where the plaintiffs alleged that they were deprived of property without due process. See id. Accordingly, the Court construes Plaintiffs' fourteenth cause of action as a procedural due process claim pursuant to § 1983.

Section 1983 claims are subject to the liberal federal rules of "notice pleading." See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993). To establish a procedural due process claim in a section 1983 action, plaintiffs must establish three elements: (1) that they have a life, liberty or property interest protected by the Due Process Clause; (2) that this interest was

deprived within the meaning of the Due Process Clause; and (3) that the state did not afford them adequate procedures prior to depriving them of their protected interests, See Daniels v. Williams, 474 U.S. 327, 329-30 (1986); see also Franklin v. Aycock, 795 F.2d 1253, 1261-62 (6th Cir. 1986); Haag v. Cuyahoga County, 619 F. Supp. 262, 279 (N.D. Ohio 1985), aff'd 798 F.2d 1414 (6th Cir. 1986).

The Sixth Circuit discussed procedural due process actions in Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1983). In Vicory, the court held "that for purposes of § 1983 damage suits claiming the deprivation of a property interest without procedural due process of law, the plaintiff must plead and prove that state remedies for redressing the wrong are inadequate." Id. at 1066. Stated differently,

> a party may maintain a procedural due process § 1983 case in federal court only if that party alleges and proves that there was a constitutional violation under color of law and,
> 1. The state did not have any remedy; or
> 2. The state had a remedy but it was deemed inadequate; or
> 3. The state had an adequate remedy in form, both procedurally and in damages, but the state did not apply it or misapplied its remedy.

Haag, 619 F. Supp. at 278-79. In this case, Plaintiffs' amended complaint, liberally construed, appears to indicate that Plaintiffs feel that the Defendants alleged actions in obtaining their loan file by means of a subpoena violates Plaintiffs' rights to procedural due process.

Plaintiffs' failure to identify and present allegations of sufficient facts as to why the proceedings were not adequate prior to the deprivation of their property is fatal. So long as Plaintiffs had an opportunity to be heard "at a meaningful time and in a meaningful manner," Plaintiffs have been afforded their due process rights. See Armstrong v. Manzo, 380 U.S. 545, 552 (1965); see also Mathews v. Eldridge, 424 U.S. 319, 333 (1976). In this case, Plaintiffs have not alleged sufficient facts for the Court to find that there were no adequate procedures afforded to them prior to their alleged property deprivation. Cf. Berridge v. Heiser, No. C-2-95-272, 1997 WL 834170, at *3-4 (S.D. Ohio Dec. 4, 1997). Consequently, Plaintiffs' failure to allege more than a bald assertion that Defendants violated Plaintiffs' procedural due process rights fails to state a claim upon which relief can be granted.

Moreover, Plaintiffs fail to present sufficient allegations that a life, liberty or property interest was implicated by the Defendants' alleged actions. The only conceivable interest that could be afforded to Plaintiffs is a right under the Fair Credit Reporting Act.[2] In a prior Opinion and Order, this Court found that Star Bank is not a "consumer reporting agency" for the purposes of the FCRA. (See Doc. # 74.) As a result, Star Bank could in no way be found liable

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[2] The Court previously disposed of Plaintiffs' constitutional arguments relating to a claim that the Star Bank Defendants violated Plaintiffs' right to privacy. For the reasons set forth in this Court's prior Opinion and Order dated March 28, 1998, the Court finds that Plaintiffs have no constitutional right to privacy implicated in their proposed First Amended Complaint. (See Doc. # 74.)

for a violation of the FCRA. Similarly, Star Bank could not have violated Plaintiffs' due process if Plaintiffs had no rights under the FCRA against Star Bank.

As for the other three groups of Defendants, Plaintiffs cannot show that they have an interest under the FCRA. The FCRA limits liability only for "dissemination of consumer credit reports by consumer reporting agencies." Ippolito v. WNS, Inc., 864 F.2d 440, 448 n.8 (7th Cir. 1988). Plaintiffs cannot show that their loan file in question was a "consumer report.[3] Accordingly, Plaintiffs have no rights under the

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[3] "Consumer report" is defined as follows:

> The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for - (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) other purposes authorized under section 1681b of this title. The term does not include (A) any . . . report containing information solely as to transactions or experiences between the consumer and the person making the report. . . .

15 U.S.C. § 1681a(d). This definition also has four elements, each of which must be present for a report to fall within the coverage of

FCRA against Defendants. Because a consumer report is not involved in this case, Plaintiffs have no rights under the FCRA.

Therefore, Plaintiffs' conclusory allegations coupled with their inability to show that they have a life, liberty or property interest protected by the Due Process Clause fails to state a procedural due process claim. The Court finds that Plaintiffs' proposed fourteenth cause of action is without merit.

In Plaintiffs' proposed fifteenth cause of action, Plaintiffs bring a § 1983 claim. In order to establish liability under § 1983 (for a cause of action other than a violation of procedural due process), a plaintiff need only show that the defendants, acting under color of state law, caused the

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the Act. (1) There must be a communication of information (2) by a consumer reporting agency, as defined in the Act, (3) which bears on a consumer's credit status or general reputation, and (4) which is used or is expected to be used in the determination of the consumer's eligibility for credit, employment, insurance, or other commercial benefit specified in the Act.

Plaintiffs' loan file fails to meet this definition. Plaintiffs cannot show that a consumer reporting agency made a communication to the Defendants. Defendants allegedly received the loan file from Star Bank -- an entity which this Court found is not a consumer reporting agency. In their Complaint, Plaintiffs assert that only Star Bank is a consumer reporting agency. Consequently, the Court finds that Plaintiffs' loan file allegedly turned over from Star Bank to Defendants is not a "consumer report."

deprivation of a federal right. See Kentucky v. Graham, 473 U.S. 159, 166 (1985) (citing Monroe v. Pape, 365 U.S. 167 (1961)). In other words, the terms of § 1983 demand only two allegations: (1) that a person deprived the plaintiff of a federal right, constitutional or statutory; and (2) that the person acted under color of state law when depriving the plaintiff of the federal right. See Gomez v. Toledo, 446 U.S. 635, 640 (1980). If either element is missing, then a § 1983 claim has not been properly pleaded. See Christy v. Randlett, 932 F.2d 502, 504 (6th Cir. 1991).

Assuming that Defendants acted under color of state law,[4] Plaintiffs still must show that the Defendants caused the

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[4] In support of their claims that Defendants acted under color of state law when they allegedly deprived Plaintiffs of their rights, Plaintiffs cite to Timson v. Weiner, 395 F. Supp. 1344, 1348 (S.D. Ohio 1975) (Duncan, J.) . Plaintiffs claim that Timson supports their theory that when John Gonzales, Esq. issued a subpoena, he became a state actor. The conduct of counsel in representing clients before a state tribunal does not in and of itself constitute action under color of state law for the purposes of § 1983. See id. In Timson, however, Judge Duncan held that the issuance of a subpoena of the Ohio State Personnel Board of Review is an act of the State of Ohio and "that when such a subpoena is caused to be issued by a private litigant or attorney pursuant to the subpoena privilege granted litigants by the State of Ohio, such an act is state action for the purposes of the Fourteenth Amendment and action under color of state law for purposes of 42 U.S.C. § 1983." Id.

On the other hand, Defendants cite to Barnard v. Young, 720 F.2d 1188, 1189 (11th Cir. 1983). In Barnard, the Eleventh Circuit held that a private attorney who employed a subpoena duces

deprivation of a federal (constitutional or statutory) right. Plaintiffs fail to do so. Plaintiffs offer nothing more than a conclusory statement that "Plaintiffs have been deprived of their rights, privileges and immunities secured by the Constitution and the laws of the United States of America to which they are entitled as citizens of said country by the actions of the Defendants and for which they seek restitution pursuant to 42 U.S.C. § 1983 against the Defendants." (Pls.' Proposed Am. Compl. at ¶ 107.) These mere conclusory allegations of deprivation of civil rights are insufficient to withstand motion to dismiss. See, e.g., Zemsky v. City of

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tecum was not a state actor for the purposes of § 1983 analysis. The Eleventh Circuit cited the "vast weight of authority that private attorneys, by virtue of being officers of the court, do not act under color of state law within the meaning of section 1983." Id. (citing Polk County v. Dodson, 454 U.S. 312, 318 (1981); Black v. Bayer, 672 F.2d 309 (3d Cir. 1982); Lindley v. Amoco Prod. Co., 639 F.2d 671 (10th Cir. 1981); Hall v. Ouillen, 631 F.2d 1154 (4th Cir. 1980); Slavin v. Curry, 574 F.2d 1256, 1265 (5th Cir. 1978); Fine v. City of New York, 529 F.3d 70, 74 (2d Cir. 1975); Skolnick v. Martin, 317 F.2d 855 (7th Cir. 1963)). The Court also stated that if "an attorney does not become a state actor merely by virtue of instigating state court litigation, . . . then the attorney does not become a state actor merely by employing state authorized subpoena power." Id.

Because these two courts are apparently the only courts to address the issue of whether merely issuing a subpoena is enough to support a claim of state action and because these courts are in conflict, the Court will assume, for the purposes of this Opinion and Order only, that Plaintiffs are correct. That is, the Court finds that Timson is the proper rule of law in the Southern District of Ohio.

New York, 821 F.2d 148, 151 (2d Cir. 1987); Smith v. Rose, 760 F.2d 102, 106 (6th Cir. 1985); Hill v. McClellan, 490 F.2d 859 (5th Cir. 1974); Robinson v. McCorkle, 462 F.2d 111 (3d Cir. 1972); Jemzura v. Public Serv. Comm'n, 961 F. Supp. 406, 413 (N.D.N.Y. 1997); Hall v. Dworkin, 829 F. Supp. 1403, 1412 (N.D.N.Y. 1993). Thus, Plaintiffs proposed fifteenth cause of action fails to state a claim upon which relief can be granted.

4. Plaintiffs' Proposed State Law Claims

Plaintiffs' proposed sixteenth cause of action is an IIED claim brought under Ohio law. The Supreme Court of Ohio, in Yeager v. Local Union 20, 6 Ohio St. 3d 369 (1983), set forth the elements of IIED. "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. . . . " Id. at 374 (citing Restatement (Second) of Torts § 46(1) (1965)). Emotional distress is severe if "a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." See Paugh v. Hanks, 6 Ohio St. 3d 72, 78 (1983). Examples of serious emotional distress "include traumatically induced neurosis, psychosis, chronic depression, or phobia." Id.

In their complaint, Plaintiffs aver that "the actions of the Defendants . . . have caused emotional distress, pain, suffering and damages to the Plaintiffs." (Pls.' Proposed Am. Compl. at ¶ 110.) Thus, from the face of their complaint, Plaintiffs fail to set forth all the elements of a prima facie case of IIED. Cf. Kramer v. Windsor Park Nursing Home, Inc., 943 F. Supp. 844, 854 (S.D. Ohio 1996) (The three elements

of tort of IIED are "(1) that the defendant intended to cause the plaintiff serious emotional distress, (2) that the defendant's conduct was extreme and outrageous, and (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress."). Plaintiffs fail to allege that the actions of Defendants were so "outrageous" that Plaintiffs suffered some form of mental illness. Plaintiffs cannot recover for actions of Defendants that were allegedly upsetting. The Court recognizes that the process of litigation is something that causes emotional distress. But without more, Plaintiffs cannot recover for IIED. Consequently, Plaintiffs fail to state a claim upon which relief can be granted for their proposed sixteenth cause of action.

Their seventeenth and final proposed cause of action is brought for abuse of process under Ohio law. To establish an abuse of process claim under Ohio law, the Supreme Court of Ohio stated that a plaintiff must prove the following: "(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process." Yaklevich v. Kemp, Schaeffer & Rowe CO., L.P.A., 68 Ohio St. 3d 294, para. 1 of the syllabus (1994). Under the second element of abuse of process, "there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." Id. at 298 (quoting William L. Prosser & Page Keeton, The Law of Torts § 121, at 898 (5th ed. 1984)). Using this analysis, Plaintiffs fail to state a cause of action for abuse of process.

First, as the G-P Defendants note, from the very face of their complaint, Plaintiffs do not allege that the G-P Defendants had any involvement in issuing a subpoena for Plaintiffs' loan file or any connection with Star Bank's production of the loan file pursuant to a subpoena. Accordingly, Plaintiffs fail to allege facts sufficient to find that the G-P Defendants can be held liable for abuse of process.

Second, in order to meet the second element of an abuse of process claim to survive a motion to dismiss, Plaintiffs had to allege facts demonstrating that Defendants had an ulterior purpose in obtaining the "personal and privileged information, (Pls.' Proposed Am. Compl. at ¶ 112), by means of a subpoena. Instead, Plaintiffs set forth mere conclusory allegations with no facts to support the allegations. Cf. Nosker v. Greene County Reg'l Airport Auth., No. 96 CA 101, 1997 WL 271407, at *2-3 (Ohio App. May 23 1997). Therefore, the elements of an abuse of process claim were not pleaded and the Court will not allow Plaintiffs to amend their complaint to state a cause of action for abuse of process.

IV. CONCLUSION

Upon consideration and being duly advised, the Court **DENIES** Plaintiffs' motion for leave to amend their complaint.
(See Doc. # 44.) Because the Court did not grant Plaintiffs' motion for leave to amend, the Court **ORDERS** the Clerk of Courts (1) to **STRIKE** from the record Plaintiffs' proposed Amended Complaint which was inadvertently file-stamped in this case, (see Doc. # 76), and (2) to **CONVERT** the

document into an exhibit attached to Plaintiffs' notice to the Court, (see Doc. # 75). Further, the Court finds that the four motions to strike filed by the four groups of Defendants are **MOOT**. (See Doc. ## 58, 60, 62, 63.) The Court **DENIES** the three motions to strike filed by Plaintiffs. (See Doc. ## 81, 84, 91.) The Star Bank Defendants are hereby **DISMISSED** from this case in accordance with this Court's prior Opinion and Order. (See Doc. # 74.) The Court will address the five remaining pending motions on its docket shortly.

IT IS SO ORDERED.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed March 26, 1998]

No. C-2-97-677

MICHAEL F. HAHN, et al.,
Plaintiffs,

v.

STAR BANK, CENTRAL OHIO, ATIMA, et al.,
Defendants.

OPINION AND ORDER

This matter is before the Court on a motion by certain defendants to dismiss the complaint, or in the alternative, for summary judgment. Plaintiffs in this case (the "Hahns") have asserted numerous claims against, among others, Star Bank and certain individual employees of Star Bank (the "Individual Star Bank Defendants") (collectively the "Defendants").[1]

[1] In addition to Star Bank and the Individual Star Bank Defendants, Plaintiffs name the following persons as defendants:

Many of these defendants in this case have motions currently pending. This Opinion and Order addresses only the motions by Star Bank and the Individual Star Bank Defendants. All of the Hahns' claims arise from Star Bank's alleged improper disclosure of the Hahns' loan file maintained by Star Bank (the "loan file"). Moreover, all of the Hahns' federal law claims against the Individual Star Bank Defendants are based on their capacity as employees of Star Bank. Therefore, the Court treats the Hahns' claims against Star Bank and their claims against the Individual Star Bank Defendants together. For the reasons that follow, the Court **GRANTS** the Defendants' motion for summary judgment and **DISMISSES** all of the Hahns' claims as they relate to Star Bank and the Individual Star Bank Defendants. The Defendants' motion to dismiss pursuant to Rule 12 is **MOOT**.

I. Background

The following background is not in dispute. Star Bank approved a loan application for the Hahns. The Hahns used the money to build a new house.

The Hahns were not satisfied with the dry wall used in building their new house and they filed a lawsuit in the Common Pleas Court of Franklin County. They sued 84 Lumber, the company from whom they purchased the dry

---

(1) John Gonzales; (2) Crabbe, Brown, Jones, Potts & Schmidt; (3) William Leahy; (4) Thompson, Hine & Flory; (5) Domtar Gypsum; (6) 84 Lumber & Home Center; (7) Pierce-Harding Real Estate, Inc.; (8) 84 associates, Inc.; and (9) Georgia Pacific.

wall, and Domtar Gypsum, the manufacturer of the dry wall. Star Bank was not a party to the state court action.

On October 29, 1993, during the course of the litigation, the attorney for 84 Lumber, John Gonzales, obtained a copy of the Hahns' loan file from Star Bank.[2] After the state court jury rendered a verdict in favor of the 84 Lumber and Domtar Gypsum, Mr. Gonzales gave the Hahns' attorney numerous documents obtained by 84 Lumber during discovery, including the loan file.

On the basis of these facts, the Hahns brought this action essentially alleging that Star Bank improperly disclosed the confidential information contained in the loan file. The Hahns bring claims under both federal and state law.

In their eleventh and twelfth cause of action, the Hahns bring claims for violations of the federal Fair Credit Reporting Act ("the Act"). In their third, fourth, and thirteenth causes of action, the Hahns bring claims for the violation of their constitutional rights, including the right to privacy. The Hahns' remaining causes of action are based on state law.

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[2] To obtain the loan file, Mr. Gonzales allegedly issued a subpoena to Star Bank. The Hahns raise numerous issues relating to the propriety of the subpoena. The Court need not address these issues to reach its conclusion.

II. Analysis

Star Bank moves to dismiss this action under Rule 12 of the Federal Rules of Civil Procedure. In addition, Star Bank moves for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The Court relies on Rule 56 in analyzing this case.

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is available when, after appropriate discovery, there is no issue of material fact and the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Summary judgment is not appropriate if a proper issue for trial remains. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

A. The Fair Credit Reporting Act

Defendants argue, among other things, that there is no genuine issue of material fact that Star Bank is not subject to the Fair Credit Reporting Act. Defendants assert that Star Bank does not meet the Act's definition of a "consumer reporting agency" and is therefore not subject to the duties imposed by the Act. The Hahns do not dispute the proposition that Star Bank is subject to the Act only if it is a "consumer reporting agency." Instead, the Hahns argue that Star Bank is a consumer reporting agency and is therefore subject to the Act. Thus, the Court must decide whether Star Bank is a consumer reporting agency.

1. Consumer Reporting Agency

The Act imposes on "consumer reporting agencies" certain duties with respect to creating and providing "consumer reports" to third parties. See, e.g., 15 U.S.C. § 1681e(b) (1996). The Act defines a "consumer reporting agency" as follows:

> The term "consumer reporting agency" means any person which, for monetary fees, dues or on a cooperative basis regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

15 U.S.C. § 168la(f) (1996) (emphasis added). Thus, to qualify as a consumer reporting agency, Star Bank must engage in the practice of assembling or evaluating consumer credit information for the purpose of furnishing consumer reports[3] to third parties.

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[3] The Act defines the term "consumer report" as follows:

> The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is

Defendants assert that Star Bank does not gather, assemble or evaluate consumer credit information for the purpose of furnishing consumer reports to third parties. Defendants offer the affidavit of James J. Barresi in support of this assertion. Mr. Barresi testifies in the affidavit that, based on his personal knowledge as an employee for Star Bank, Star Bank does not "gather, assemble or evaluate consumer credit information to make such information available to third parties." (Doc. # 4 Ex. D.) The Court concludes that, based on this evidence, Star Bank satisfies its burden on summary judgment to establish the absence of a genuine issue of material fact on an element for which the Plaintiffs will bear the burden at trial.

In response, the Hahns present a transcript of an alleged phone conversation between Marie Hahn and an employee of Star Bank. In the conversation, the alleged employee disclosed to Mrs. Hahn that, if Star Bank sold their mortgage loan to another bank, Star Bank would pass on the loan file to the purchasing bank. The Hahns argue that this fact makes Star Bank a consumer reporting agency.

> used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title.

15 U.S.C. § 1681a(d).

There are two fatal flaws with the Hahns' response. First, as Star Bank aptly points out, the transcript is inadmissible because it is not authenticated. See Fed. R. Evid. 901(6). Accordingly, the transcript fails to meet the requirements of Rule 56(e) and cannot be used to create a genuine issue of fact for trial. See Fed. R. Civ. P. 56(e).

Even if the Hahns' transcript is admissible, it does not establish that Star Bank is a consumer reporting agency. Specifically, the transcript does not establish that Star Bank regularly engaged in the practice of gathering or evaluating consumer information with the purpose of passing it along to third parties. Star Bank states that its purpose in gathering the information was to determine whether the bank should extend a loan to the Hahns. The transcript does not contradict this assertion. Quite simply, the fact that Star Bank would pass on a loan file in the event that the bank sold the loan does not, without more, establish that Star Bank engages in the practice of collecting the information for the purpose of passing it on. Consequently, even if the transcript is admissible, the Hahns fail to establish a genuine issue as to whether Star Bank is a consumer reporting agency. See Cheatam v. McCormick, No. 95-6558, 1996 WL 662887, at**4 (6th Cir. Nov. 12, 1996) (upholding summary judgment in favor of bank in part because plaintiff failed to show that bank regularly engaged in the practice of assembling or evaluating consumer credit information for the purpose of furnishing consumer reports to third parties). See also Smith v. First Nat'l Bank, 837 F.2d 1575, 1579 (11th Cir. 1988) (although there are some circumstances under which a bank could be a consumer reporting agency, a bank does not become a consumer reporting agency by furnishing third parties with information

relating solely to a transaction between the bank and the consumer).

Therefore, the Court **GRANTS** the Defendants' motion for summary judgment and the Court **DISMISSES** the Plaintiffs' eleventh and twelfth causes of action insofar as they relate to Star Bank and the Individual Star Bank Defendants.

C. Other Federal Claims

In their third, fourth and thirteenth causes of action, the Hahns allege that Star Bank violated their constitutional right to privacy and their civil rights by disclosing the loan file. These claims must fail.

First, the Sixth Circuit held that "the Constitution does not encompass a general right to nondisclosure of private information." J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981). The constitutional right to privacy is limited to certain "fundamental" rights that are "implicit in the concept of ordered liberty." Id. The Hahns' asserted interest in the nondisclosure of the loan file is "far afield" from such fundamental rights. See id. Accordingly, their claims under the constitutional right to privacy fail.

In addition, the Hahns' civil rights claims, brought under 42 U.S.C. § 1985(2) and 1985(3), fail. Section 1985(2) relates to conspiracies to interfere with the administration of justice in federal courts and is clearly inapplicable in this case. See e.g., Willing v. Lake Orion Community Sch. Bd. of Trustees, 924 F. Supp. 815, 819 (E.D. Mich. 1996). Moreover, an essential prerequisite for an action under § 1985(3) is proof that the defendant's conduct was motivated

by racial or class based discriminatory animus in violation of a plaintiff's right to equal protection under the laws. See Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971); Volunteer Med. Clinic v. Operation Rescue, 948 F.2d 218, 223-24 (6th Cir. 1991). Not only do the Hahns fail to allege or establish such animus, they also fail to allege or establish that they are members of a class warranting the protection of the equal protection doctrines. Accordingly, the Hahns fail to establish any legal entitlement to relief for these causes of actions. The Court **GRANTS** the Defendants' motion for summary judgment and dismisses the Plaintiffs' third, fourth and thirteenth causes of action insofar as they relate to Star Bank and the Individual Star Bank Defendants.

D. No Jurisdiction Over State Law Claims

There are two potential bases for the Court's jurisdiction over the Hahns' state law claims. The first potential basis for jurisdiction is diversity jurisdiction. It is well established that diversity jurisdiction requires complete diversity of parties, which is to say that the citizenship of all of the plaintiffs must be diverse from the citizenship of all of the defendants. See 28 U.S.C. § 1332 (1996); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 (1978); Safeco Ins. Co. v. City of White House, 36 F.3d 540, 545 (6th Cir. 1994). In this case, the Hahns' complaint lists Ohio as the citizenship of Plaintiffs and of the vast majority of defendants. Thus, there is no diversity jurisdiction in this case.

Second, provided the Court has federal question jurisdiction over any of the Hahns' federal law claims, the Court might have supplemental jurisdiction over the Hahns' state law claims. See Lyon v. Quality Courts United, 249

F.2d 790, 795 (6th Cir. 1988). The Court, however, dismissed all of the Hahns' federal law claims against Star Bank and the Independent Star Bank Defendants. Accordingly, the Court rejects supplemental jurisdiction over the Hahns' state law claims against these parties. See United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726-27 (1965) ("[I]f the federal claims (supporting supplemental jurisdiction) are dismissed before trial, even though not insubstantial in the jurisdictional sense, the state claims should be dismissed as well."). The Court **GRANTS** the Defendants' motion for summary judgment as it relates to Hahns' state law causes of action against the Defendants.

Nevertheless, the Court recognizes that a motion by the Hahns to Amend their Complaint is currently pending. (See Doc. # 44.) The Court does not consider the merits of that motion in this Opinion and Order. If this Court permits the Hahns to amend their complaint at some point in the future and their Amended Complaint states a valid claim against the Defendants under federal law, the Court would have supplemental jurisdiction over the Hahns' state law claims. Therefore, the Court **DISMISSES** the Hahns' state law causes of action **WITHOUT PREJUDICE**. The Hahns may refile their state law causes of action as they pertain to the Defendants in an Amended Complaint. The Court **ORDERS** the Hahns, who are proceeding without the assistance of counsel, to file a complete proposed Amended Complaint within twenty-one days of the date of this Order.

III. Conclusion

Upon consideration and being duly advised, the Court

GRANTS the Defendants' motion for summary judgment and **DISMISSES** with prejudice the Hahns' third, fourth, eleventh, twelfth and thirteen causes of actions as they pertain to Star Bank and the Individual Star Bank Defendants. The Court **DISMISSES WITHOUT PREJUDICE** the Hahns' state law causes of action as they pertain to Star Bank and the Individual Star Bank Defendants. The Court **ORDERS** the Hahns, who are proceeding without the assistance of counsel, to file a complete proposed Amended Complaint within twenty-one days of the date of this Order. The Defendants motion to dismiss pursuant to Rule 12 is **MOOT**.

IT IS SO ORDERED.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed October 20, 1999]

No. 98-3680

MICHAEL F. HAHN and MARIE HAHN, *Plaintiffs-Appellants,*	)
v.	)
STAR BANK, et al., Defendants-Appellees.	)

ORDER

BEFORE: JONES, SILER, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote

* Judge Nelson recused himself from participation in this ruling.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____

Leonard Green, Clerk

(2)

No. 99-1206

Supreme Court, U.S.
FILED
FEB 15 2000
CLERK

In The Supreme Court of the United States

MICHAEL F. HAHN and MARIE HAHN,
Petitioners,

v.

STAR BANK; et al.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO THE PETITION OF WRIT OF CERTIORARI

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and 84 Associates, Inc.

QUESTION PRESENTED

1. Should this Court deny certiorari when the decision below does not raise the questions presented for review by the Petitioners, and the Petition instead would require this Court to make fact-specific determinations regarding the sufficiency of the evidence?

PARTIES TO THE PROCEEDING

The Petition accurately lists the Petitioners as Michael F. Hahn and Marie Hahn. The Petition accurately lists the Respondents with the following exceptions: (1) Respondent Star Bank, Central Ohio, ATIMA has merged with Firstar Corporation and is now known as Firstar Corporation, but will be referred to herein as Star Bank for the convenience of the parties and the Court; and (2) Respondent Domtar Gypsum is now known as G-P Gypsum, but will be referred to herein as Domtar-Gypsum for the convenience of the parties and the Court.

CORPORATE DISCLOSURE STATEMENTS SUBMITTED PURSUANT TO S.CT. RULE 29.6

For Respondents 84 Lumber and Home Center, Pierce-Hardy Real Estate, Inc. and 84 Associates, Inc.:

Respondent 84 Lumber and Home Center is a fictitious name for 84 Lumber Company, a Pennsylvania Limited Partnership. Respondents Pierce-Hardy Real Estate, Inc. and 84 Associates, Inc. have no corporate parents.

For Respondent Star Bank, Central Ohio, ATIMA:

Respondent Star Bank, Central Ohio, ATIMA has merged with Firstar Corporation and is now known as Firstar Corporation, which has no corporate parent.

For Respondents Domtar Gypsum and Georgia Pacific Corporation:

Respondent Domtar Gypsum, now known as G-P Gypsum Corp., is a wholly-owned subsidiary of Respondent Georgia Pacific Corp. Respondent Georgia Pacific Corp. has no corporate parent.

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STATEMENT OF THE CASE

All of Petitioners' claims in this case are based upon a single, demonstrably incorrect factual premise: that Star Bank improperly provided a copy of their loan file to Petitioners' opponent in other unrelated litigation without having been required to do so by a valid subpoena. But the undisputed evidence established that Star Bank produced Petitioners' loan file in response to a facially valid subpoena. Indeed, the supposedly non-existent subpoena is part of the record in this case. Because Petitioners' entire case is based upon a factual premise that the courts below have found to be incorrect, and because it involves no issues of overriding importance, this is not an appropriate case for consideration by this Court.

Petitioners, proceeding *pro se*, have presented six questions for review by this Court. Three of those questions were not part of the basis for the Sixth Circuit's decision and thus are not properly appealable or reviewable by this Court. The other three are based upon Petitioners' disagreement with the lower court's factual findings and with the Sixth Circuit's application of well-settled law in its affirmance of a routine procedural ruling on a discovery issue. These are not appropriate subjects for review on a Petition for Certiorari.

Petitioners' claims in this case arise out of a lawsuit that they filed in the Court of Common Pleas of Franklin County, Ohio in 1992 against Respondent 84 Lumber & Home Center ("84 Lumber"). There, the Petitioners claimed to have experienced problems with drywall that 84 Lumber had installed in a home that Petitioners were having built (the "Drywall Litigation"). 84 Lumber, which was represented by Respondents John Gonzales and Crabbe, Brown, Jones, Potts & Schmidt, impleaded Respondent Domtar Gypsum, the manufacturer of the drywall, which was represented by Respondent Thompson, Hine & Flory LLP, through one of its attorneys, Respondent William Leahy.

On October 8, 1993, in the course of the Drywall Litigation, Respondent Gonzales prepared and served a subpoena on Star Bank, which was not a party to the Drywall Litigation. The subpoena required the bank to produce "[a]ny and all files, documents, or other papers regarding Construction Loan No. 13953 in the name of Michael F. or Maria A. Hahn." Construction Loan No. 13953 was a loan that Star Bank had made to the Petitioners in September 1990 for construction of their home.

Petitioners' counsel in the Drywall Litigation, Mr. Michael Fusco, was served with a copy of the Star Bank

subpoena the same day that it was issued.[1/] The subpoena, which was attached to Star Bank's Motion for Summary Judgment and is part of the Court's file in this case, was served on Star Bank on October 12, 1993. Petitioners incorrectly state that the subpoena was void under Ohio law because it was overbroad, and that Star Bank, which was not even a party to the Drywall Litigation, had some sort of duty to move to quash "the overbroad subpoena." Petition, p. 11. But the subpoena very specifically requested only documents relating to construction loan No. 13953. In compliance with the subpoena, Star Bank produced a copy of that loan file to Respondent Gonzales sometime in mid-October, 1993.

On October 29, 1993, at the end of the trial of the Drywall Litigation, Respondent Gonzales gave Petitioners the copy of their loan file that he had received from Star Bank

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[1/] Respondent Gonzales submitted an affidavit stating that he sent a copy of the subpoena to Mr. Fusco, and authenticating a copy of his transmittal letter. *See* Petition, Court of Appeals Opinion – 9/2/99, p. 8a (referring to the "documentary evidence" presented by Respondent Gonzales). Petitioners incorrectly assert that their own attorney, Mr. Fusco, submitted conflicting affidavits as to whether he was served with a copy of the subpoena. Petition, pp. 7 and 9. But as the Sixth Circuit correctly found, "the uncontroverted evidence shows that [Petitioners'] attorney was timely provided with a copy of the subpoena." Petition, Court of Appeals Opinion – 9/2/99, p. 15a.

pursuant to the subpoena. Petitioners state that they were "appalled" to learn that Respondent Gonzales had obtained their loan file from Star Bank. Petition, p. 14. Their attorney had apparently not advised them that it had been subpoenaed.

Three years later, on October 28, 1996, Petitioners filed a lawsuit against Star Bank, its statutory agent (Respondent Thomas R. Green) and a Vice President of Star Bank (Respondent Paul Beery). Petitioners, who were represented by counsel at that time,[2/] filed their claims in the United States District Court for the Southern District of Ohio, although there was an obvious lack of complete diversity and their complaint did not raise any federal claims. Petitioners dismissed the case after Star Bank filed a motion to dismiss for lack of subject matter jurisdiction.

Petitioners then refiled their claims on June 13, 1997 in a 35 page complaint containing 13 causes of action against the 15 Respondents and seeking over $20,000,000 in compensatory and punitive damages, all as a result simply of the production of a loan file pursuant to a facially valid subpoena. Their new Complaint alleged claims under the Fair

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[2/] The Ohio Supreme Court has since suspended that attorney from the practice of law for an indefinite period of time for unrelated reasons. *Columbus Bar Assn. v. Elsass*, 86 Ohio St.3d 195, 713 N.E.2d 421 (Ohio 1999). Petitioners are now acting *pro se*.

Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681-1681u, as well as constitutional right to privacy and civil rights claims, among others.

Based upon the undisputed factual evidence presented to the District Court, summary judgment was granted in favor of Respondents on all of Petitioners' claims. Petition, Appendix B-D. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court, and subsequently denied Petitioners' Petition for Rehearing and Petition for Rehearing En Banc. Petition, Appendix A and E.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' "QUESTIONS PRESENTED" RELATING TO FCRA ARE IRRELEVANT TO THE SIXTH CIRCUIT'S DECISION THAT PETITIONERS' FCRA CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

Three of Petitioners' six proposed Questions for Review are irrelevant because they relate to issues that were not part of the Sixth Circuit's basis for its decision. Petitioners argue in **Question II** that a subpoena signed by an attorney cannot be considered an "order of a court" under FCRA, 15 U.S.C. § 1681b, and for that reason Star Bank violated FCRA by producing their loan file in response to

such a subpoena.[3] In **Question IV**, Petitioners argue that because their loan file contained a credit report, Star Bank should be liable as a "user" under FCRA for producing it to Respondent Gonzales pursuant to a subpoena. They further suggest that the 84 Lumber Respondents and the G-P Respondents, who were merely Petitioners' opponents in the Drywall Litigation, are also liable as "users" under FCRA. In **Question V**, Petitioners argue that Star Bank is a "consumer reporting agency" under FCRA and thus should be liable for disclosure of the loan file. However, because the Sixth Circuit's decision with respect to Petitioners' FCRA claims was based entirely on the statute of limitations, the issues raised in **Questions II, IV and V** were not even discussed by the Sixth Circuit.[4]

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[3] In fact, the Ohio Rules of Civil Procedure authorize an attorney to sign and issue a subpoena "on behalf of the court in which an action is pending." *See* Ohio Civ.R. 45(A)(2).

[4] Contrary to Petitioners' assertions, the Sixth Circuit did not rule that Star Bank was not a "consumer reporting agency" under FCRA, nor that a "consumer report" loses its status under FCRA "when it is disseminated from a user to a third party user," nor that the acquisition of Petitioners' loan file by Respondent Gonzales "was permissible under FCRA." Petition, pp. 17 and 21-24. Instead, the Sixth Circuit simply ruled that any claims that Petitioners might have had against any of the Respondents under FCRA are barred by the statute

(continued...)

Because **Questions II, IV and V** were not decided below and were not part of the basis for the Sixth Circuit Court of Appeals' decision, they are not appropriate "Questions Presented for Review" to this Court. *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459 (1999) (Supreme Court would not decide issue raised in party's brief to the Circuit Court of Appeals, but not decided below); *see also, Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 379 (1996) ("We generally do not address arguments that were not the basis for the decision below.")

Petitioners' time to file claims under FCRA began to run, at the latest, on October 29, 1993, when they discovered that Respondent Gonzales had obtained a copy of their loan file from Star Bank. Because Petitioners did not file any action under FCRA until June 13, 1997, three and one-half years later, the Sixth Circuit concluded that Petitioners' claims were barred by FCRA's two year statute of limitations, 15 U.S.C. § 1681p. Petition, Court of Appeals Opinion – 9/2/99, p. 8a. In reaching this conclusion, the Sixth Circuit held that Petitioners' allegations were not sufficient to toll the two year statute of limitations under FCRA because no representative of Star Bank had made any willful misrepresentation of material information that was required

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[4/] (...continued)
of limitations. Petition, Court of Appeals Opinion – 9/2/99, p. 8a.

to be disclosed under FCRA. *Id.* Petitioners' **Question VI** is nothing more than an invitation for this Court to review those allegedly erroneous factual findings because Petitioners do not agree with them. This is not a proper basis for seeking review in this Court.[5/]

Since **Questions II, IV and V** raise issues that were not even part of the Sixth Circuit's decision, they are not proper subjects for appeal and are not subject to review by this Court. Similarly, **Question VI**, which merely alleges that the Sixth Circuit made erroneous factual findings with respect to the alleged misrepresentations by a Star Bank

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[5/] Petitioners apparently do not understand the Sixth Circuit's ruling on this issue and have misstated it in their Petition. They claim that the Sixth Circuit has ruled that an attorney-issued subpoena which has "every appearance of being 'an order of the court'" is valid under FCRA. Petition, p. 16. What the Sixth Circuit actually held is that, because the subpoena had every appearance of being "an order of a court," a Star Bank representative did not make a willful misrepresentation when he informed Mr. Hahn that Petitioners' loan file had been released pursuant to a valid subpoena. Petition, Court of Appeals Opinion – 9/2/99, p. 7a. Because there was no willful misrepresentation, FCRA's tolling provision did not apply, and Petitioners' claims were barred by the FCRA statute of limitations. *Id.* at 8a. Whether the subpoena was actually "an order of a court" under FCRA was not addressed by the Sixth Circuit and is not relevant.

representative, is also not an appropriate question for review by this Court. *See* S.Ct. Rule 10.

II. THE SCOPE OF DISCOVERY AVAILABLE ON A MOTION FOR SUMMARY JUDGMENT IS WELL-SETTLED AND IS NOT AN APPROPRIATE ISSUE FOR REVIEW BY THIS COURT.

In **Question III**, Petitioners argue that they were denied the opportunity to conduct sufficient discovery prior to the district court's summary judgment decision. Not only is this factually incorrect, it is simply a routine discovery issue that is not an appropriate issue for review by the United States Supreme Court.[6/]

A district court's decision to limit discovery will be reversed on appeal only if the decision was an abuse of discretion resulting in substantial prejudice. *See Emmons v.*

[6/] Discovery was stayed in the case below shortly after Star Bank filed its motion for summary judgment, and Petitioners were informed that they could move for additional discovery if they believed that it was needed. Petition, Court of Appeals Opinion – 9/2/99, p. 23a. Petitioners were represented by counsel at that time, but no affidavit under Fed.R.Civ.P. 56(f) requesting additional discovery was filed until several months later – after the court had already granted summary judgment in favor of Star Bank. *Id.*

McLaughlin, 874 F.2d 351, 356-57 (6th Cir. 1989). In the present case, the Sixth Circuit reviewed the district court's decision and held that the district court did not abuse its discretion in limiting discovery, when no affidavit was timely filed under Fed.R.Civ.P. 56(f). Petition, Court of Appeals Opinion – 9/2/99, p. 23a. Petitioners' statement that the Sixth Circuit "never ruled on our motion for discovery and our 56(f) affidavit" is simply not true. Petition, p. 18. In fact, the Sixth Circuit held, after reviewing Petitioners' affidavit, that none of the additional discovery requested was relevant to its decision and, therefore, Petitioners could not have been substantially prejudiced. Petition, Court of Appeals Opinion – 9/2/99, p. 23a.[7/]

"A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S.Ct. Rule 10. The law with respect to the conduct of discovery in the context of a summary judgment motion is well-established.

[7/] Petitioners are also incorrect in their assertion that the "District Court granted summary judgment to Star Bank on the sole evidence of an affidavit of an interested party, James J. Barresi, an employee of Star Bank." Petition, pp. 7, 19 and 24. While Mr. Barresi's affidavit was among the evidence that the court considered, it was not the sole evidence. Indeed, it was not even relevant to the statute of limitations issue on which the Sixth Circuit based its affirmance of the dismissal of Petitioners' FCRA claims.

See Fed.R.Civ.P. 56(f); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex v. Catrett*, 477 U.S. 317 (1986). Petitioners do not allege that the law on this issue is incorrect; they simply do not like the way that it was applied in this case, and they disagree with the factual conclusions made by the court. This is not a proper subject for review by this Court.

III. THERE IS NO SPLIT AMONG THE CIRCUITS ON THE ISSUE OF WHETHER A PRIVATE ATTORNEY ISSUING A SUBPOENA IN A STATE COURT PROCEEDING IS A "STATE ACTOR" FOR PURPOSES OF 42 U.S.C. § 1983.

Petitioners' **Question I** poses the question of whether an attorney who issues a subpoena in a state court proceeding is a "state actor" or is acting "under color of state law" for purposes of 42 U.S.C. § 1983. The Sixth Circuit held that Respondent Gonzales, a private attorney, did not act under color of state law within the meaning of § 1983 when he issued a subpoena to Star Bank. Petition, Court of Appeals Opinion – 9/2/99, pp. 17a-18a. Thus, the Sixth Circuit affirmed the District Court's denial of Petitioners' motion for leave to amend their complaint to include a claim under 42 U.S.C. § 1983 that Respondents, acting under color of state

law, deprived them of their constitutional rights in obtaining Petitioners' loan file from Star Bank.[8/]

At least two other circuits have reached the same conclusion as the Sixth Circuit on this identical issue. *See Angelico v. Lehigh Valley Hospital, Inc.*, 184 F.3d 268 (3rd Cir. 1999) (attorney issuing a subpoena is merely "resorting to an available state procedure" and is not using state officials to enforce that procedure); *Barnard v. Young*, 720 F.2d 1188, 1189 (10th Cir. 1983) ("attorney does not become a state actor merely by employing state authorized subpoena power"). *See also, Skolnick v. Martin*, 317 F.2d 855 (7th Cir. 1963) (private attorney is not acting under color of state law in noticing and taking the deposition of a party). In addition, the Sixth Circuit's decision in this case is consistent with this Court's holding that private attorneys, by virtue of being "officers of the court," are not state actors under color of sate law within the meaning of § 1983. *Polk County v. Dodson*, 454 U.S. 312, 318 (1981). Respondents are aware of no Circuit Court of Appeals decision, nor have Petitioners identified any, that is in conflict with the Sixth Circuit's decision on this issue. Thus, there is no split among the circuits, and Supreme Court review of this issue is neither necessary nor appropriate.

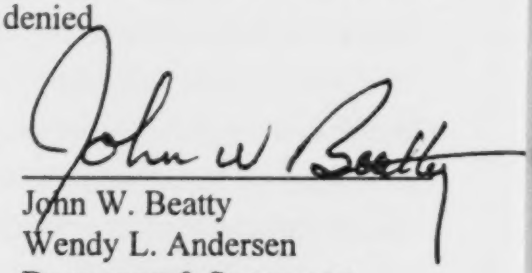
[8/] The issuance of a subpoena by an attorney is an available procedure that is authorized under Ohio law. *See* Ohio Civ.R. 45(A)(2).

Finally, although not specifically identified as a "Question Presented for Review," Petitioners also argue in their Petition that they should have been permitted to amend their Complaint to add a procedural due process claim under 42 U.S.C. § 1983. Petition, pp. 12-13. The Sixth Circuit held that an amendment of the Complaint to add that claim would have been futile because Petitioners could not demonstrate that the available state procedures were inadequate, or that they had a constitutionally protected property interest in the privacy of their loan file. Petition, Court of Appeals Decision – 9/2/99, pp. 14a-15a.[2/] The Sixth Circuit also held that because Petitioners did not have a claim under FCRA, they had no property rights in their loan file warranting protection under the Due Process Clause. *Id.* Petitioners' plea to this Court is based upon their disagreement with the Sixth Circuit's application of well-settled federal law. There is no split among the circuits requiring resolution by this Court.

[2/] In reaching this conclusion, the Sixth Circuit noted that Petitioners' counsel in the Drywall Litigation had been served with a copy of the subpoena and could have followed state procedures to object to the subpoena, but failed to do so. *Id.* Petitioners cannot bring a federal due process claim after failing to take advantage of state procedures which allowed them to file a motion to quash the subpoena.

CONCLUSION

For the reasons given above, Petitioners' Petition for Writ of Certiorari should be denied.



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(3)

No. 99-1206

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL F. HAHN and
MARIE HAHN,

Petitioners,

v.

STAR BANK, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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This response addresses the Respondents misstatements as they appear in their Brief In Opposition.

A. RESPONDENTS' STATEMENT OF THE CASE

Respondents base their argument on a facially valid subpoena, which is in conflict with 15 U.S.C. § 1681b(1). *See* Petition, p. 3. The District Court did not rule on the subpoena, *see* Petition, District Court Opinion and Order-3/26/98, p. 59a, footnote 2: ". . . The Hahns raise numerous issues relating to the propriety of the subpoena. The Court need not address these issues to reach its conclusion." The Sixth Circuit incorrectly ruled that an "appearance of 'an order of a court'" is sufficient under the FCRA, overruling the 1989 Congressional amendment.

The six questions presented in the Petition are based on the Sixth Circuit's affirming the District Court's decision. (The Sixth Circuit reversed the District Court's decision on color of law.) All of the other District Court's rulings on the issues were affirmed by the Sixth Circuit.

After Mr. Fusco informed us that Star Bank's counsel had called him every day for 2 weeks demanding an affidavit, concerning his receipt of the subpoena, Mr. Fusco provided us with an affidavit which stated that he had no recollection of receiving the subpoena. Mr. Fusco later recanted his affidavit and gave Star Bank an affidavit saying that he didn't remember. Mr. Fusco's conflicting affidavits needed to be resolved in discovery, by deposition.

Star Bank could have moved to object to the overly broad subpoena under Ohio Rule 45:

> (C) Protection of Persons Subject To Subpoena.

> (2)(b) . . . If objection is made, the party serving the subpoena shall not be entitled to production except pursuant to an order of the court by which the subpoena was issued.

(Obviously Ohio law does not recognize an attorney issued subpoena as an order of a court, neither does the FCRA.) Star Bank mailed our entire loan file, *ex parte*, to Mr. Gonzales. *See* Petition, pp. 10 and 11. Respondents never asserted that Mr. Fusco was provided with a copy of the file even though the Rule 45 subpoena was used for discovery of the file.

Star Bank knew that the subpoena was invalid under the FCRA, but deliberately disseminated the "specifically requested" documents relating to construction loan No. 13953. *See* Petition, p. 28 at #4:

> . . . All the documents in Star Bank's possession had been gathered solely to assess Michael and Maria Hahn's financial status, credit worthiness, and eligibility to receive a construction loan from Star Bank, Loan No. 13593.

This proves that Star Bank willfully disseminated a consumer report under the FCRA without a valid order of a court. *See Zamora v. Valley Fed. Sav. & Loan Ass'n.*, 811 F.2d 1368, 1371 (10th Cir. 1987):

> . . . Both are vice-presidents of defendant, a savings and loan which does frequent consumer checks and which has a compliance officer, an in-house attorney, to ensure compliance with federal statutes, such as the FCRA.

Respondents attempt to mislead this Court as to the time of Mr. Elsass's suspension in this instant case. *See* Petition, Court of Appeals Opinion-9/2/99, p. 5a:

> In November of 1997, discovery was stayed by the magistrate pending a decision on Star Bank's motion. Also in November of 1997, the Hahns' attorney, Elsass, was suspended from the practice of law for reasons unrelated to the Hahns' case. The Hahns have been proceeding *pro se* since that time.

Mr. Elsass was suspended the day after the pre trial conference in which discovery was stayed. He told us that the Magistrate had told him that Star Bank's motion was being treated as a Motion to Dismiss and that he had until January 5, 1998 to amend to a 42 U.S.C. § 1983 cause of action. He told the magistrate that he would move for discovery if any motions for summary judgment were filed, (as the order reflects). *See* Petition, Court of Appeals Opinion-9/2/99, p. 23a.

There was *no* discovery in this instant case in which to dispute any factual evidence. Summary judgment was only granted to the *Star Bank Defendants*. *See* Petition, District Court Opinion and Order- 5/11/98, p. 34a.

B. RESPONDENT'S REASONS FOR DENYING THE WRIT

Section I.

Respondents misconstrue Question IV of the Petition which asks this Court to decide the issue of what defines a consumer report and when a consumer report is protected under the FCRA. Question V of the Petition pertains to Star Bank as a consumer reporting agency. Question VI of the Petition

pertains to disclosure of the file. The Respondents are attempting to crossover the Questions and the issues to mislead this Court on the importance of *each* Question.

Questions II, IV and V were certainly discussed by the Sixth Circuit.

1. Question II--The Sixth Circuit applied the rulings in *In Re Grand Jury Proceedings*, 503 F. Supp. 9, 12, a Federal grand jury case, to this instant case, a civil litigation case involving inferior drywall. The Sixth Circuit sanctioned that an "appearance" of a court order signed by an attorney is the equivalent of a judge's signature for an order of the court under the FCRA. *See* Petition, Court of Appeals Opinion-9/2/99, p. 7a.

2. Question IV pertains to the definition of a consumer report and its protection under the FCRA. *See* Petition, Court of Appeals Opinion-9/2/99, p. 8a. The Sixth Circuit refers to the TRW credit report in our loan file. The Sixth Circuit does not reverse the District Court's decision that the loan file, including the TRW report, is not a consumer report or that a consumer report becomes a non-consumer report when it is disseminated from a user, (Star Bank), to a third party user, (Mr. Gonzales). *See* Petition, District Court Opinion and Order-5/11/98, pp. 30a, 3la: "The FCRA imposes liability only for dissemination of consumer credit reports by consumer reporting agencies."

3. Question V pertains to Star Bank as a consumer reporting agency. The Sixth Circuit makes reference to Star Bank as a consumer reporting agency. *See* Petition, Court of Appeals Opinion-9/2/99, p. 8a: ". . . even assuming that FCRA's requirements apply to Star Bank. (*See* 15 U.S.C. § 168la(f) for the definition of a 'consumer reporting agency')." The Sixth Circuit affirmed the District Court's decision that Star

Bank was not acting as a consumer reporting agency in this instant case.

Because the issues in Questions II, IV and V of the Petition were explicitly set forth in the Court of Appeals Opinion and the District Court was not reversed, but affirmed concerning these issues, the Sixth Circuit did decide these issues.

Question VI states: "Whether a bank, acting as a consumer reporting agency, has to disclose all information in its file to a consumer?" The Sixth Circuit affirmed the District Court's decision that Star Bank was not acting as a consumer reporting agency in this instant case and that our TRW credit report is not a consumer report and then ruled that all of our FCRA claims are barred by the statute of limitations. Taking it a step further, the Sixth Circuit ruled that Star Bank did not have to disclose ". . . the nature and substance of all information in its files" (15 U.S.C. § 1681g), even if Star Bank was a consumer reporting agency. *See* Petition, Court of Appeals Opinion-9/2/99, p. 8a. The Sixth Circuit erroneously ruled that Star Bank acting as a consumer reporting agency, would not have to disclose the truth about the subpoena in the loan file.

Jeff Bonynge, representative of Star Bank, acting as a consumer reporting agency in this instant case, stated in his conversation with Petitioner Michael Hahn, on July 3, 1995:

> It it may . . . I can tell you that our general, uh, process when we are subpoenaed is to, uh communicate with our counsel and typically they go through the file and pull out what they feel is being specifically asked for and then remove what is considered personal and confidential which is . . .

At the time of this conversation, Mr. Bonynge knew that he had disseminated a consumer report in response to the subpoena, as per # 4 of his affidavit. If he had disclosed to us that the subpoena had to be an order of the court signed by a judge and that it was not valid, we would have filed a lawsuit at that time. Mr. Bonynge knew that the truth would be material to Star Bank's liability in this matter and he chose to fraudulently conceal the truth, that Star Bank had violated the FCRA.

Respondents claim that we misstated the Sixth Circuit's ruling on the subpoena. Because the Sixth Circuit cited a 1980 FCRA case, *In Re Grand Jury Proceedings*, 503 F. Supp. 9, 12:

> reasoning that an "order of a court" under this section of FCRA may be oral, may be a paper bearing the word "order" that is "signed by a judge or other judicial officer [,] [o] it may be a subpoena, writ of execution or other process")

Respondents misunderstand this ruling in light of the fact that bank counsel looked at the subpoena.

Star Bank acted as a consumer reporting agency in this instant case when it disseminated our consumer report to a third party without a valid order of the court under the FCRA, for an impermissible purpose, litigation. We requested disclosure of our loan file from Star Bank 4 times in March and April of 1997. Star Bank did not deny that they had a duty to disclose our file to us or state that they would not disclose our file to us. The only correspondence from Star Bank on this matter stated that they couldn't find our file and that they would get back to us when they found it. Under 15 U.S.C. § 1681g, Star Bank had to disclose the file to us. The Sixth Circuit, by affirming the District Court's decision, that Star Bank was not acting as a consumer reporting agency, a genuine issue in dispute, ignored

a statute of limitations under the FCRA which started to run in April, 1997, two months before this instant lawsuit was filed.

Question VI of the Petition pertains to the duty of a consumer reporting agency in disclosure under the FCRA; it does not merely allege "erroneous factual findings with respect to misrepresentations by a Star Bank representative."

Section II.

Respondents use the words "sufficient discovery" and "additional discovery" in their brief. In fact, there was *no* discovery in this instant case. Respondents misquote the Magistrate's order. *See* Petition, Court of Appeals Opinion-9/2/99, p. 23a. The word "additional" is not in the order.

In conflict with Civil Rule 56(c) there are *no* "depositions, answers to interrogatories, and admissions on file." The evidence of Star Bank's liability, as a consumer reporting agency under the FCRA, is in Star Bank's possession. Without "full opportunity to conduct discovery," we could not "present affirmative evidence" of Star Bank's violations and liability under the FCRA. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986).

We were never notified by the Court that Star Bank's Motion To Dismiss was being converted to a Motion For Summary Judgment. When the Gonzales Defendants filed a Motion For Summary Judgment, we filed a Motion For Discovery, following the Magistrate's order on discovery. We question at this point whether we were required to file a 56(f) affidavit as the Gonzales Defendants demanded because there was *no* prior discovery in this instant case. Respondents point out that a 56(f) affidavit is filed for "additional discovery." Respondents claim that the Sixth Circuit reviewed our 56(f) affidavit and decided that "none of the additional discovery

requested was relevant to its decision" and that we had not been "substantially prejudiced." This proves that the Sixth Circuit is in conflict with *Anderson, supra*, 477 U.S. 242 (1986) and *Celotex v. Catrett*, 477 U.S. 317 (1986), in ruling on our 56(f) affidavit when there was no prior discovery in this instant case. *See Anderson, supra*, 477 U.S. 242 at 250, footnote 4:

> This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.

The Sixth Circuit affirmed the District Court's decision not to rule on our Motion For Discovery, before our 56(f) affidavit filed later for "additional discovery" could be considered. Contrary to Respondents' claim, *Anderson, supra*, 477 U.S. 242 and *Celotex, supra*, 477 U.S. 317 could not be properly applied to this instant case when the specific rulings in these cases for full opportunity to conduct discovery were not first followed.

Respondents falsely state: "While Mr. Barresi's affidavit was among the evidence that the court considered, it was not the sole evidence." *See* Petition, District Court Opinion and Order-3/26/98, p. 62a:

> . . . The Court concludes that based on this evidence, [referring to Mr. Barresi's affidavit], Star Bank satisfies its burden on summary judgment to establish the absence of a genuine issue of material fact as an element for which Plaintiffs will bear the burden at trial.

The Sixth Circuit did not reverse the summary judgment granted to Star Bank, with no discovery, by the District Court, on the sole evidence of the affidavit of Mr. Barresi, a Star Bank employee. Instead, the Sixth Circuit ignored the genuine issue in dispute, whether Star Bank was a consumer reporting agency in this case, and erroneously used the statute of limitations to dismiss this case.

Section III.

In ruling on color of law, the District Court correctly applied *Timson v. Weiner*, 395 F. Supp. 1344 (S.D. Ohio 1975) in which state subpoena power was misused by an attorney to violate constitutional rights. The Sixth Circuit applied *Barnard v. Young*, 720 F.2d 1188 (10th Cir. 1983) in which the state subpoena power was not misused by an attorney and no constitutional rights were violated. *See Timson v. Weiner*, 395 F. Supp. at 1348: "A subpoena is the order of an arm of the state compelling the presence of a person under threat of contempt." Respondents have argued that they were under compulsion of law to produce the file (*ex parte*). Mr. Gonzales used an attorney to serve the subpoena as provided by Ohio Rule 45. *See Georgia v. McCollum*, 505 U.S. 42, 53 (1992): "The State cannot avoid its constitutional responsibilities by delegating a public function to private parties. *Cf. Terry v. Adams*, 345 U.S. 461 (1953)." The public function theory was followed in *United States v. Wiseman*, 445 F.2d 792 (2d Cir. 1971).

Our amended Complaint included a cause of action based on a denial of procedural due process and a separate cause of action for 42 U.S.C. § 1983. *See* Petition, pp. 8-13. Our property interest under the Fourteenth Amendment in the protection of the privacy of our consumer report under the FCRA was argued below.

Congress dictated the appropriate hearing under the FCRA which is a motion for an order *through* the court, providing a judge's review and signature, before deprivation of the privacy of a consumer report.

Respondents have not provided any evidence that due process was followed in the *ex parte* production of our loan file, which contained a consumer report. Mr. Fusco, in his affidavit states: "4. I have no recollection of any notice from Star Bank or John Gonzales that in fact, the documents were being produced prior to trial and that Star Bank was not appearing at trial." Mr. Fusco did not recant this part of his affidavit. As a trial lawyer, Mr. Fusco would not have knowingly allowed an *ex parte* production of documents to his disadvantage.

The *ex parte* production of our loan file was fraudulently concealed. Mr. Bonynge less than 2 years later fraudulently concealed the illegality of the *ex parte* production once again. *See Jones v. Transohio Sav. Ass'n*, 747 F.2d 1037 (6th Cir. 1984), at page 1043. The Sixth Circuit ruled that fraudulent concealment can not be decided without discovery.

CONCLUSION

For the foregoing reasons, our Petition for Writ of Certiorari should be granted.

/s/_____
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